

Exhibit 6

321

1 THE UNITED STATES DISTRICT COURT
2 FOR THE DISTRICT OF MASSACHUSETTS
MDL DOCKET NO. 01CV12257-PBS

3 *****

4 IN RE: PHARMACEUTICAL
INDUSTRY AVERAGE WHOLESALE
5 PRICE LITIGATION

6 *****

7 THIS DOCUMENT RELATES TO:
8 ALL ACTIONS

9 *****

10 C O N F I D E N T I A L

11 VOLUME: II

CONTINUED DEPOSITION of RAYMOND S.
12 HARTMAN, Ph.D., a witness called on behalf
13 of the Defendants pursuant to the Federal
14 Rules of Civil Procedure, before Judith
McGovern Williams, Certified Shorthand
15 Reporter, Registered Professional
16 Reporter, Certified Realtime Reporter, and
17 Notary Public in and for the Commonwealth
18 of Massachusetts, at the offices of Ropes
19 & Gray, One International Place, Boston,
20 Massachusetts 02110, on Friday,
21 October 8, 2004, commencing at 9:36 a.m.

22

Raymond S. Hartman, Ph.D. Confidential - Attorneys' Eyes Only
Volume II Boston, MA

October 8, 2004

2 (Pages 322 to 325)

<p style="text-align: right;">322</p> <p>1 APPEARANCES:</p> <p>2</p> <p>3 HAGENS BERMAN L.L.P.</p> <p>4 Thomas M. Sobol, Esquire</p> <p>5 One Main Street, 4th Floor</p> <p>6 Cambridge, Massachusetts 02142</p> <p>7 617-482-3700</p> <p>8 tom@hagens-berman.com</p> <p>9 on behalf of the Plaintiffs</p> <p>10</p> <p>11 HOGAN & HARTSON L.L.P.</p> <p>12 Steven M. Edwards, Esquire</p> <p>13 Hoa T.T. Hoang, Esquire</p> <p>14 875 Third Avenue</p> <p>15 New York, New York 10022</p> <p>16 212-918-3506</p> <p>17 smedwards@hhlaw.com</p> <p>18 htthoang@hhlaw.com</p> <p>19 on behalf of the Defendant</p> <p>20 Bristol-Myers Squibb</p> <p>21</p> <p>22</p>	<p style="text-align: right;">324</p> <p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 ROPES & GRAY L.L.P.</p> <p>4 Steven A. Kaufman, Esquire</p> <p>5 One International Place</p> <p>6 Boston, Massachusetts 02110-2624</p> <p>7 617-951-7000</p> <p>8 skaufman@ropesgray.com</p> <p>9 on behalf of the Defendant Schering</p> <p>10 Corporation/Schering-Plough</p> <p>11</p> <p>12 SKADDEN, ARPS, SLATE, MEAGHER &</p> <p>13 FLOM L.L.P.</p> <p>14 Katherine Armstrong, Esquire</p> <p>15 Four Times Square</p> <p>16 New York, New York 10036-6522</p> <p>17 212-735-3000</p> <p>18 karmstro@skadden.com</p> <p>19 on behalf of the Defendant Amgen</p> <p>20</p> <p>21 SHOOK, HARDY & BACON L.L.P.</p> <p>22 Joseph G. Matye, Esquire</p> <p>23 2555 Grand Boulevard</p> <p>24 Kansas City, Missouri 64106-2613</p> <p>25 816-474-6550</p> <p>26 on behalf of the Defendant Aventis</p>
<p style="text-align: right;">323</p> <p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 KAYE SCHOLER L.L.P.</p> <p>4 Saul P. Morgenstern, Esquire</p> <p>5 425 Park Avenue</p> <p>6 New York, New York 10022-3598</p> <p>7 212-836-7210</p> <p>8 smorgenstern@kayescholer.com</p> <p>9 on behalf of the Defendant Novartis</p> <p>10 Pharmaceuticals Corp.</p> <p>11</p> <p>12 DAVIS, POLK & WARDWELL</p> <p>13 D. Scott Wise, Esquire</p> <p>14 450 Lexington Avenue</p> <p>15 New York, New York 10017</p> <p>16 212-450-4000</p> <p>17 dwise@dpw.com</p> <p>18 on behalf of the Defendant Astra</p> <p>19 Zeneca Pharmaceuticals Corp.</p> <p>20</p> <p>21</p> <p>22</p>	<p style="text-align: right;">325</p> <p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 PATTERSON, BELKNAP, WEBB & TYLOR L.L.P.</p> <p>4 William F. Cavanaugh, Jr., Esquire</p> <p>5 1133 Avenue of the Americas</p> <p>6 New York, New York 10036-6710</p> <p>7 212-336-2000</p> <p>8 wfcavanaugh@pbwt.com</p> <p>9 on behalf of the Defendant</p> <p>10 Johnson & Johnson</p> <p>11</p> <p>12 COVINGTON & BURLING</p> <p>13 Mark Lynch, Esquire</p> <p>14 1201 Pennsylvania Avenue, N.W.</p> <p>15 Washington, D. C. 20015</p> <p>16 202-662-5544</p> <p>17 mlynch@cov.com</p> <p>18 on behalf of GlaxoSmithKline</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>

326	<p>1 APPEARANCES (Continued):</p> <p>2</p> <p>3 MORGAN, LEWIS & BOCKIUS L.L.P.</p> <p>4 Scott A. Stempel, Esquire</p> <p>5 1111 Pennsylvania Avenue, N.W.</p> <p>6 Washington, D. C. 20004</p> <p>7 202-739-5211</p> <p>8 sstempel@morganlewis.com</p> <p>9 on behalf of the Defendants Pfizer Inc.</p> <p>10 and Pharmacia Corp.</p> <p>11</p> <p>12 ALSO PRESENT:</p> <p>13 Janice H. Halpern, Leaf Group</p> <p>14</p> <p>15 Reporter's note: Additional parties</p> <p>16 participated via telephone conference call</p> <p>17</p> <p>18</p> <p>19</p> <p>20</p> <p>21</p> <p>22</p>	328	<p>1 EXHIBITS</p> <p>2 Number Page</p> <p>3</p> <p>4 Exhibit Hartman 014 Multipage Integrated 331</p> <p>5 Prescription Drug Program</p> <p>6 Master Agreement, production</p> <p>7 numbers UFCW 00747 through</p> <p>8 UFCW 00766</p> <p>9 Exhibit Hartman 015 One-page memorandum dated 331</p> <p>10 September 1, 1999, to</p> <p>11 Ms. Davidson from Ms. Goldstein</p> <p>12 and attached multipage</p> <p>13 Preliminary Agreement,</p> <p>14 production numbers CVH 000052</p> <p>15 through CVH 000135</p> <p>16 Exhibit Hartman 016 Three-page Statement of the 399</p> <p>17 Federal Trade Commission in the</p> <p>18 Matter of Caremark RX,</p> <p>19 Inc./AdvancePCS, File</p> <p>20 No. 031 0239</p> <p>21 Exhibit Hartman 017 Deposition of Raeann Maxwell 418</p> <p>22</p>
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4 (Pages 330 to 333)

<p style="text-align: right;">330</p> <p>1 PROCEEDINGS</p> <p>2 (Prior to the commencement of</p> <p>3 the deposition, the following exhibits</p> <p>4 were marked:</p> <p>5 (Multipage Pharmacy Benefit</p> <p>6 Program Proposal, production</p> <p>7 numbers ESI-277-00002066</p> <p>8 through ESI-277-00002077 marked</p> <p>9 Exhibit Hartman 011 for</p> <p>10 identification.)</p> <p>11 (Multipage Caremark, Inc.</p> <p>12 Prescription Benefit Management</p> <p>13 Agreement, production numbers</p> <p>14 CMK-AWP-002818 through</p> <p>15 CMK-AEP-002844 marked Hartman</p> <p>16 Exhibit Hartman 012 for</p> <p>17 identification.)</p> <p>18 (Multipage AdvancePCS Health,</p> <p>19 L.P. Managed Pharmacy Benefit</p> <p>20 Services Agreement, production</p> <p>21 numbers CMK-AWP 003724 through</p> <p>22 CMK-AWP 003749 marked</p>	<p style="text-align: right;">332</p> <p>1 continued direct examination by</p> <p>2 MR. EDWARDS:</p> <p>3 ---</p> <p>4 Q. How are you today, Dr. Hartman?</p> <p>5 A. I am fine. How are you doing?</p> <p>6 Q. Have you thought at all about your</p> <p>7 testimony yesterday?</p> <p>8 A. I guess.</p> <p>9 Q. Is there anything you would like to</p> <p>10 change?</p> <p>11 A. No.</p> <p>12 Q. Is there any aspect of your declaration</p> <p>13 you would like to change as a result of</p> <p>14 the things we discussed yesterday?</p> <p>15 A. No. There was one addition, actually,</p> <p>16 that might be relevant. That I realized</p> <p>17 it is also publicly available -- publicly</p> <p>18 known is that another case in which I have</p> <p>19 submitted testimony that is going to trial</p> <p>20 is the Terazosin matter in which class has</p> <p>21 been certified, which I hadn't mentioned,</p> <p>22 besides the Cipro case.</p>
<p style="text-align: right;">331</p> <p>1 Exhibit Hartman 013 for</p> <p>2 identification.)</p> <p>3 (Multipage Integrated</p> <p>4 Prescription Drug Program</p> <p>5 Master Agreement, production</p> <p>6 numbers UFCW 00747 through</p> <p>7 UFCW 00766 marked</p> <p>8 Exhibit Hartman 014 for</p> <p>9 identification.)</p> <p>10 (One-page memorandum dated</p> <p>11 September 1, 1999, to</p> <p>12 Ms. Davidson from Ms. Goldstein</p> <p>13 and attached multipage</p> <p>14 Preliminary Agreement,</p> <p>15 production numbers CVH 000052</p> <p>16 through CVH 000135 marked</p> <p>17 Exhibit Hartman 015 for</p> <p>18 identification.)</p> <p>19 ---</p> <p>20 RAYMOND S. HARTMAN, Ph.D.,</p> <p>21 having been previously duly sworn,</p> <p>22 testified as follows in answer to</p>	<p style="text-align: right;">333</p> <p>1 Q. Now in this case at this point, you have</p> <p>2 not talked to any class members; is that</p> <p>3 correct?</p> <p>4 A. I don't think I have, no.</p> <p>5 Q. And you have not talked to any PBMs; is</p> <p>6 that correct?</p> <p>7 A. So far, not in this case, no.</p> <p>8 Q. You have not talked to any manufacturers</p> <p>9 so far in this case? Correct?</p> <p>10 A. I have been present when there has been</p> <p>11 discussions of exchanges of data and</p> <p>12 invoice data and setting forth an</p> <p>13 understanding, a pre-30(b)(6)</p> <p>14 conversation, and so that there were</p> <p>15 people representing defendants who were --</p> <p>16 understood their claim -- their data, but</p> <p>17 that is the extent of it.</p> <p>18 Q. And you haven't talked to any pharmacies</p> <p>19 in connection with this case; is that</p> <p>20 correct?</p> <p>21 A. Not in connection with this case.</p> <p>22 Q. Nor have you talked to any wholesalers in</p>

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<p style="text-align: right;">334</p> <p>1 connection with this case?</p> <p>2 A. Not to date.</p> <p>3 Q. Have you talked to any physicians in</p> <p>4 connection with this case?</p> <p>5 A. Not to date.</p> <p>6 Q. Have you talked to any benefit consultants</p> <p>7 in connection with this case?</p> <p>8 A. It is my recollection over the history of</p> <p>9 the retention in this matter that there</p> <p>10 were conversations that involved benefit</p> <p>11 consultants in -- in meetings or in a</p> <p>12 conference call, but I couldn't recall the</p> <p>13 names of those persons.</p> <p>14 Q. Okay. Do you recall what was discussed?</p> <p>15 A. Issues of the use of AWP and WAC and</p> <p>16 pricing in this industry.</p> <p>17 Q. Now did you take notes on that discussion?</p> <p>18 A. No. None that I have.</p> <p>19 Q. Is there any reason why you did not</p> <p>20 mention that discussion in your report?</p> <p>21 A. There -- no reason -- it was not necessary</p> <p>22 beyond what I do indicate that I have</p>	<p style="text-align: right;">336</p> <p>1 will be limited, and taking the claims</p> <p>2 data that will inform me as to what</p> <p>3 reimbursements were and asking a number of</p> <p>4 limited questions of each of them, will</p> <p>5 characterize the information that needs to</p> <p>6 be characterized for me to implement my</p> <p>7 formulaic methodology.</p> <p>8 Q. You are going to need information from</p> <p>9 payers in order to develop your</p> <p>10 expectation yardsticks; correct?</p> <p>11 MR. SOBOL: Objection to form.</p> <p>12 A. I am going to, as I have done in the</p> <p>13 implementation of these types of formulaic</p> <p>14 methodologies in other matters, past</p> <p>15 matters where class has been certified and</p> <p>16 it is going to trial, I am going to</p> <p>17 require a, as in all economics, I am going</p> <p>18 to require the identification of a sample</p> <p>19 of members in these groups that will be</p> <p>20 sufficient to characterize the behavior</p> <p>21 for the groups as a whole, and this is</p> <p>22 what statisticians and econometricians do,</p>
<p style="text-align: right;">335</p> <p>1 relied on, that I learned nothing more</p> <p>2 from that discussion than I was learning</p> <p>3 from the materials upon which I relied.</p> <p>4 Q. Okay. And is it fair to say that you are</p> <p>5 going to need information from all of the</p> <p>6 entities that I have just mentioned in</p> <p>7 order to complete your work in this case?</p> <p>8 MR. SOBOL: Objection to form.</p> <p>9 A. Well, it is fair to say that I will need</p> <p>10 and have already begun the effort to</p> <p>11 identify a representative sample of</p> <p>12 individuals in that group such that the</p> <p>13 data that they will provide, say if we're</p> <p>14 talking about a third-party payer, say a</p> <p>15 Cigna or an Aetna, that the data that they</p> <p>16 will provide will, given the size of the</p> <p>17 institution, allow me to view</p> <p>18 reimbursement rates and claims data over a</p> <p>19 very -- over a considerable percentage of</p> <p>20 scripts for which reimbursement was paid,</p> <p>21 so that I will essentially design samples</p> <p>22 of members of each of those groups that</p>	<p style="text-align: right;">337</p> <p>1 design samples.</p> <p>2 So, yes, I will need to talk to</p> <p>3 members, a limited number of members, and</p> <p>4 get data from those entities or</p> <p>5 individuals in the groups that you have</p> <p>6 identified, and that is something that is</p> <p>7 a common practice and procedure, and</p> <p>8 that's what I will do.</p> <p>9 Q. If you are talking about expectations,</p> <p>10 isn't it the case that every individual</p> <p>11 payer will have its own individual</p> <p>12 expectation?</p> <p>13 MR. SOBOL: Objection to form.</p> <p>14 A. It is the case that as -- as in any</p> <p>15 analysis of any economic market, there may</p> <p>16 be slight differences among a variety of</p> <p>17 individuals in whatever aspect of that</p> <p>18 market you are analyzing, and by taking a</p> <p>19 sample, there is no statistical study that</p> <p>20 is done by any economist that when the</p> <p>21 sample is large enough that they go out</p> <p>22 and they survey the population of all the</p>

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<p style="text-align: right;">338</p> <p>1 interested parties.</p> <p>2 There are methods of identifying</p> <p>3 subsets of people that are representative</p> <p>4 for expectations and looking at the claims</p> <p>5 data, more importantly, looking at the</p> <p>6 claims data and the reimbursement rates</p> <p>7 paid, a reflection of what the result of</p> <p>8 their expectations and the market led to</p> <p>9 in terms of their reimbursement.</p> <p>10 Q. Can you refer me to any authoritative</p> <p>11 literature for the proposition that you</p> <p>12 can determine the expectations of</p> <p>13 individuals within a population by</p> <p>14 sampling?</p> <p>15 A. The -- if -- if you would like, I can put</p> <p>16 together a bibliography of articles where</p> <p>17 sampling is done for a variety of</p> <p>18 purposes, and whether it is aimed at</p> <p>19 expectations or beliefs or whether it is</p> <p>20 aimed at -- I mean how do you think they</p> <p>21 do the surveys about who is going to vote</p> <p>22 for Kerry or for Bush? They have a</p>	<p style="text-align: right;">340</p> <p>1 beliefs in a whole range of different --</p> <p>2 for different economic variables, for</p> <p>3 behavior in different ways, and whether</p> <p>4 there is something about a survey of list</p> <p>5 prices, I can't say that right now. I can</p> <p>6 certainly do a Google search and find out</p> <p>7 the extent to which that is done, but</p> <p>8 there is fundamentally no difference in</p> <p>9 doing the kind of research or surveying</p> <p>10 that we are talking about doing there than</p> <p>11 surveying other types of expectations or</p> <p>12 understandings about certain either events</p> <p>13 or economic variables or some fact.</p> <p>14 Q. Have you attempted to determine the size</p> <p>15 of the population for which you are doing</p> <p>16 the sampling?</p> <p>17 A. Well, certainly the census department and</p> <p>18 a lot of the work that is done by the DHHS</p> <p>19 and Medicare and Medicaid as they're doing</p> <p>20 their sampling, and you look at NAMCS's</p> <p>21 data which I use and I cite in my -- in</p> <p>22 attachment -- well, I forget where I have</p>
<p style="text-align: right;">339</p> <p>1 representative sample of 500 or 1,000</p> <p>2 people, and they developed a set of</p> <p>3 questions about what their expectations</p> <p>4 are.</p> <p>5 That's what statisticians do.</p> <p>6 They identify subsets of people that</p> <p>7 represent populations at large. And they</p> <p>8 are able then to characterize, quite</p> <p>9 precisely, from very small samples, how a</p> <p>10 country will vote or how a state will</p> <p>11 vote. That's what is done, whether its</p> <p>12 intentions, buying purposes, what they</p> <p>13 did, what their intentions are, what their</p> <p>14 beliefs were.</p> <p>15 Q. Can you identify any instance for me in</p> <p>16 which an economist has attempted to</p> <p>17 determine expectations with respect to a</p> <p>18 list price or a benchmark price by</p> <p>19 surveying a sample of a population?</p> <p>20 A. The question as posed makes little sense</p> <p>21 in the following respect: the -- surveys</p> <p>22 are designed to elicit responses about</p>	<p style="text-align: right;">341</p> <p>1 cited it in there -- they use very small</p> <p>2 -- they might use a one percent, two</p> <p>3 percent sample, but.</p> <p>4 Q. But one percent or two percent of what?</p> <p>5 A. Of --</p> <p>6 Q. What is the total universe that you're</p> <p>7 looking at for which you are trying to</p> <p>8 derive a sample?</p> <p>9 A. Well, I'm assuming --</p> <p>10 MR. SOBOL: Objection to form.</p> <p>11 You may answer.</p> <p>12 Q. Maybe another way to ask the question is</p> <p>13 how many persons or entities do you think</p> <p>14 are in the proposed classes here?</p> <p>15 A. The important phenomenon to observe here,</p> <p>16 the important issues to get at, is how the</p> <p>17 yardstick beliefs affected claims data,</p> <p>18 reimbursement data on claims. So the</p> <p>19 importance is covering a sufficient number</p> <p>20 of claims and the -- and talking to the</p> <p>21 people for whom those claims and the</p> <p>22 expectations had some effect on what they</p>

<p style="text-align: right;">342</p> <p>1 believed were appropriate AWP's and WAC's</p> <p>2 and what the ASP was for those claims, and</p> <p>3 by going to and including in one's sample</p> <p>4 a number of large entities like Cigna and</p> <p>5 Aetna, one can, with a very parsimonious</p> <p>6 set of individuals, cover a spectrum by</p> <p>7 size or different attributes, say of</p> <p>8 insurers, third-party payers, or</p> <p>9 retailers, large chains, mass</p> <p>10 merchandisers, small independent</p> <p>11 pharmacies, and looking -- and at that</p> <p>12 point, what you are aggregating is claims,</p> <p>13 and one can come up with a 5, 10,</p> <p>14 15 percent sample of all claims, and one</p> <p>15 is going to be able to see, and that's --</p> <p>16 that's a -- that is -- by any standard of</p> <p>17 statistical modeling, that is a very large</p> <p>18 sample to draw conclusions about the</p> <p>19 population at large.</p> <p>20 Q. I thought you were looking at</p> <p>21 expectations, not claims?</p> <p>22 A. I am looking at -- the important thing</p>	<p style="text-align: right;">344</p> <p>1 which is: To the extent that you are</p> <p>2 trying to develop yardsticks with respect</p> <p>3 to expectations, expectations of what?</p> <p>4 A. In --</p> <p>5 THE WITNESS: Well, just share</p> <p>6 it with me, and I can --</p> <p>7 (Laughter.)</p> <p>8 (Handing documents to the</p> <p>9 witness.)</p> <p>10 THE WITNESS: Well, I'm not sure</p> <p>11 that helps actually, but I --</p> <p>12 MR. SOBOL: I'm not sure either.</p> <p>13 I don't know whether the question is about</p> <p>14 your report or something else, so.</p> <p>15 A. Well, it's --</p> <p>16 MR. EDWARDS: The record should</p> <p>17 reflect that plaintiffs' counsel just</p> <p>18 handed the witness a copy of his</p> <p>19 declaration.</p> <p>20 THE WITNESS: Okay. And I guess</p> <p>21 it should also record that the witness</p> <p>22 said "I'm not quite sure why I need this</p>
<p style="text-align: right;">343</p> <p>1 here is how reimbursement shows itself on</p> <p>2 claims.</p> <p>3 Q. Well, if you limit your sample to Cigna</p> <p>4 and Aetna, that is only two entities for</p> <p>5 whom you are going to be attempting to</p> <p>6 determine your expectation yardstick?</p> <p>7 A. What I think my previous answer will</p> <p>8 indicate is that I said I will look at</p> <p>9 some large insurers, third-party payers; I</p> <p>10 am going to identify a set of mid-sized</p> <p>11 third-party payers, different types of</p> <p>12 payers, Blue Cross/Blue Shields; I am</p> <p>13 going to identify some small third-party</p> <p>14 payers; and I am going to identify a</p> <p>15 sample that gets at the -- at different</p> <p>16 individuals within different entities and</p> <p>17 review their claim and see their claims</p> <p>18 data and ask a number of questions that</p> <p>19 will characterize what their understanding</p> <p>20 of what the relationship between AWP, WAC,</p> <p>21 and ASP was.</p> <p>22 Q. You may have anticipated my next question,</p>	<p style="text-align: right;">345</p> <p>1 at the moment, but."</p> <p>2 A. Look, what we are -- the notion of this</p> <p>3 model is that there -- my understanding is</p> <p>4 -- I am not a lawyer, but my understanding</p> <p>5 of what it means to bring a RICO claim or</p> <p>6 for a RICO violation is that there is a</p> <p>7 misrepresentation or a concealment or some</p> <p>8 kind of deceptive behavior regarding some</p> <p>9 types of -- that essentially lead to the</p> <p>10 taking of money or property from the</p> <p>11 plaintiffs, and what does</p> <p>12 misrepresentation mean? It means that</p> <p>13 what you are representing in terms of</p> <p>14 particular benchmarks that you are</p> <p>15 reporting to the market have some meaning</p> <p>16 toward prices. So there are -- I have</p> <p>17 listed a variety of sources that have</p> <p>18 characterized the types of information</p> <p>19 that people could believe -- would inform</p> <p>20 what they felt the AWP benchmark signaled</p> <p>21 about the entire spectrum of list prices</p> <p>22 and actual transactions prices, and those</p>

8 (Pages 346 to 349)

<p style="text-align: right;">346</p> <p>1 are the expectations I'm talking about, 2 and those are the -- and it was the 3 allegations as I have -- as they have been 4 put in front of me is that given those 5 expectations defendants misrepresented and 6 distorted that relationship, leading to 7 the reimbursements that were inflated and 8 the damage that occurred. 9 Q. Okay. You still haven't told me the size 10 of the population that you are sampling. 11 MR. SOBOL: Objection to form. 12 Is that a question or a -- 13 A. That -- that's a different question. We 14 were talking about -- are we going back to 15 a different line of questioning now? 16 Q. Yes. I am going back to my earlier 17 question. 18 A. So -- 19 MR. SOBOL: There is no question 20 before you. 21 MR. EDWARDS: I am sorry. There 22 is a question.</p>	<p style="text-align: right;">348</p> <p>1 have the number of people or entities in 2 the sample; and then you have the 3 population, the total population for which 4 you are doing the sample. Can you give me 5 those two numbers? 6 MR. SOBOL: Objection to the 7 form. 8 A. Preliminarily, for example, I will request 9 claims data and the ability to ask a 10 number of questions, five to seven 11 questions, about understandings about what 12 they're paying -- what their 13 reimbursements rates were paid and what 14 the ASP really was, to understand what 15 their understanding of the benchmark was, 16 and how close it accorded with what was 17 publicly known. For the third-party 18 payers, I will identify two to four large 19 institutions. I will identify probably 20 three to five mid-sized entities, perhaps 21 differentiated along different 22 institutional lines. And I will identify</p>
<p style="text-align: right;">347</p> <p>1 Q. You still haven't told me the size of the 2 population that you are sampling. Can you 3 tell me the number of people or entities 4 in the population for which you are 5 sampling? 6 A. I will design a survey and identify a set 7 of -- a number of institutions that I -- 8 for whose data I am going to want to see 9 and whom I am going to want to interview, 10 and I am going to see to the extent the 11 variability -- I am going to look at the 12 data itself, and the data will inform me 13 whether I need more information or not. 14 This is precisely the way I have 15 done damages in the Terazosin matter, and 16 this type of sampling, this is precisely 17 the way economists do these kinds of 18 modeling for any multitude of different 19 types of issues. 20 Q. Let me see if I can cut through this. As 21 I understand it, when you do a sample, you 22 have two things that you look at: you</p>	<p style="text-align: right;">349</p> <p>1 five to seven small third-party payers. 2 And I will -- and as that data comes in, I 3 will review it as to the consistency of 4 the answers it is leading to to see 5 whether there is variability or a lack of 6 variability and decide whether that is a 7 sufficient sample upon which to base the 8 ultimate calculations. 9 Q. What you have told me, I think, is that 10 you are going to have a sample size of 26 11 persons or entities. Can you tell me the 12 size of the population for which you are 13 doing the sample so that I can assess 14 whether your sample is going to have any 15 statistical confidence level? 16 A. I will tell you the following: that I 17 intend that my sample represent at least 18 10 percent of claims submitted for these 19 drugs, and so I am looking at 20 reimbursements paid. I am looking at 21 actual claims and basing it on the 22 percentage of all claims submitted and</p>

<p style="text-align: right;">350</p> <p>1 reimbursements made.</p> <p>2 Q. I guess the thing I don't understand is</p> <p>3 you keep talking about claims, and I'm</p> <p>4 trying to ask you about expectations. It</p> <p>5 seems to me that expectations exist in the</p> <p>6 real world on an entity-by-entity basis as</p> <p>7 opposed to a claim-by-claim basis. Do you</p> <p>8 disagree with me?</p> <p>9 A. I -- what -- the claims exist as they</p> <p>10 exist. The expectations are what they</p> <p>11 are. The claims data is going to</p> <p>12 characterize the result of what</p> <p>13 expectations are, and as they have been --</p> <p>14 as they have revealed themselves in actual</p> <p>15 reimbursement for a statistically</p> <p>16 sufficiently large group from which to</p> <p>17 draw understandings about claims as a</p> <p>18 whole.</p> <p>19 Q. Okay. I am going to give you one more</p> <p>20 chance to tell me what the total</p> <p>21 population is, and if you are not going to</p> <p>22 answer the question, I will move on and</p>	<p style="text-align: right;">352</p> <p>1 Q. Every entity that you talk to could</p> <p>2 potentially have its own unique</p> <p>3 understanding with respect to the</p> <p>4 yardstick; correct?</p> <p>5 MR. SOBOL: Objection to the</p> <p>6 form.</p> <p>7 A. You are asking a speculative -- I have --</p> <p>8 I have no reason to think that they all</p> <p>9 have a different one or they all have very</p> <p>10 similar ones. My guess is that they all</p> <p>11 have very similar ones.</p> <p>12 Q. But you don't know at this point?</p> <p>13 A. Well, based on the survey information that</p> <p>14 I have seen from a -- from -- that already</p> <p>15 exists, it is my guess, and looking at the</p> <p>16 fairly consistent types of discounts that</p> <p>17 are built into contracts and the fairly</p> <p>18 regular patterns of a variety of</p> <p>19 reimbursement patterns in this market, it</p> <p>20 -- all evidence points to me that there is</p> <p>21 a consistent set of expectations, and I'm</p> <p>22 going to see whether that is confirmed by</p>
<p style="text-align: right;">351</p> <p>1 assume that you are not able to answer the</p> <p>2 question.</p> <p>3 MR. SOBOL: Well, I object to</p> <p>4 that. I mean you can assume whatever you</p> <p>5 would like, but, you know, the prelude is</p> <p>6 not necessary at all.</p> <p>7 A. I'm --</p> <p>8 MR. SOBOL: I think that --</p> <p>9 There is no question before you.</p> <p>10 -- his answers have been</p> <p>11 responsive, and let a fact-finder decide</p> <p>12 that.</p> <p>13 BY MR. EDWARDS:</p> <p>14 Q. Are you going to tell me how many persons</p> <p>15 or entities are in the total population</p> <p>16 that you're trying to sample here?</p> <p>17 MR. SOBOL: Objection. Asked</p> <p>18 and answered.</p> <p>19 A. I have told you how I am going to design</p> <p>20 the survey and the sample, and it accords</p> <p>21 with standard methods, and that's as far</p> <p>22 as I'm going to take it.</p>	<p style="text-align: right;">353</p> <p>1 the survey that I'm going to initiate, and</p> <p>2 if as part of that analysis, standard</p> <p>3 analysis, which I have already done in</p> <p>4 litigation, proves to indicate that other</p> <p>5 information may be required, then I will</p> <p>6 undertake whatever sampling is necessary</p> <p>7 to do this correctly.</p> <p>8 Q. How many surveys of class members have you</p> <p>9 seen with respect to their expectations?</p> <p>10 MR. SOBOL: Objection to the</p> <p>11 form.</p> <p>12 A. It's -- I have seen many surveys. I have</p> <p>13 seen many surveys with respect to</p> <p>14 expectations. I have seen surveys with</p> <p>15 respect to what has been done.</p> <p>16 Have I seen -- what you are</p> <p>17 asking is --</p> <p>18 Q. Have you seen any surveys of class members</p> <p>19 with respect to what their expectations</p> <p>20 were in connection with the yardstick that</p> <p>21 you're developing?</p> <p>22 A. Not that I can think of to date.</p>

10 (Pages 354 to 357)

<p style="text-align: right;">354</p> <p>1 Q. Now in addition to the fact that each 2 person or entity in the survey may have 3 their own unique expectation as to the 4 yardstick, you also have to determine the 5 expectation with respect to each 6 individual drug? Correct?</p> <p>7 MR. SOBOL: Objection to the 8 form.</p> <p>9 A. The -- the yardsticks that I have 10 identified that are sufficient for the 11 analysis at hand are for the groups of 12 drugs, as I put forward in my -- in my -- 13 in my methodology, in my declaration.</p> <p>14 Q. Well, you group drugs basically into four 15 categories, as I understand it: single 16 source, multisource -- I am sorry -- five 17 categories.</p> <p>18 Why don't you take a look at 19 page 24 of your declaration.</p> <p>20 A. Do you want me to look at Mr. Sobol's 21 copy, or do you want to give me the court 22 copy?</p>	<p style="text-align: right;">356</p> <p>1 fitting into these categories, and that 2 expectations as to what the yardstick was 3 -- what the AWP as a benchmark was telling 4 third-party payers and other entities in 5 the market revolved around their 6 categorization within these classes.</p> <p>7 Q. What are you going to do if a payer tells 8 you that its expectation with respect to 9 the yardstick differed for each drug?</p> <p>10 A. The -- you are posing a hypothetical 11 question. I have no reason to anticipate 12 yet how there will be response. If there 13 is a response that I am finding in the 14 surveys that I do that there are 15 yardsticks for each different NDC, which 16 sounds profoundly implausible to me, but I 17 will let -- none of the studies or the 18 surveys that have been done have even 19 taken it to that level. You have 20 criticized some of the OIG report because 21 they have lumped branded drugs and 22 generics together. The expectations in</p>
<p style="text-align: right;">355</p> <p>1 Q. That is Exhibit 2. 2 (Handing Exhibit No. 002 to the 3 witness.)</p> <p>4 A. And which page are you on?</p> <p>5 Q. On page 24 of your declaration, you 6 propose five yardsticks --</p> <p>7 A. That's --</p> <p>8 Q. -- as I understand it: one for single 9 source drugs in the PBM realm; one for 10 multisource drugs in the PBM realm; one 11 for Medicare Part B; one for physician- 12 administered drugs in the private sector; 13 and one for generic drugs in the retail 14 sector.</p> <p>15 Is that correct?</p> <p>16 A. That is correct.</p> <p>17 Q. And so you are going to lump all drugs 18 into those five categories? Is that 19 correct?</p> <p>20 MR. SOBOL: Objection to form.</p> <p>21 A. I am going to follow the general practices 22 within this market of treating drugs as</p>	<p style="text-align: right;">357</p> <p>1 this market are framed around groups of 2 drugs and not the 38 NDCs or the 24 NDCs 3 of Lupron, per se.</p> <p>4 But to the extent that that 5 proves to be revealed in a survey 6 question, it will be something that if it 7 needs to be accommodated, something that 8 will have to be reflected in the analysis, 9 but I -- that's -- in my opinion, that is 10 profoundly unlikely.</p> <p>11 (Mr. Cavanaugh entering the 12 deposition room at 10:09 a.m.)</p> <p>13 BY MR. EDWARDS:</p> <p>14 Q. I am not criticizing anybody at this 15 point. I am just a modest tiller of the 16 facts.</p> <p>17 But what I am trying to get at 18 here is what do you plan to do if after 19 conducting the surveys you learn that each 20 of the survey participants had a different 21 expectation with respect to the 22 relationship between AWP and ASP for each</p>

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1 different drug?

2 MR. SOBOL: Objection to the
3 form.

4 Q. In other words, are you going to average
5 them? Are you going to try to account for
6 all the differences? How are you going to
7 address that?

8 MR. SOBOL: Objection. If you
9 understand the question, you may answer.

10 A. In putting forth a model of this sort,
11 which again is not unlike any type of
12 model that is done for any market, whether
13 it is at a business level or for academic
14 purposes or for litigation, there are --
15 one looks at the data that does exist and
16 sets up a structure of a model, and one
17 wants to refine that, as I said I am going
18 to do with 30(b)(6) depositions.

19 You have -- you have put forward
20 hypothetical findings in these -- in what
21 the surveys may lead to that are
22 antithetical to what I see in the surveys

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1 to date and my -- and my understanding of
2 the market.

3 Now should it turn out to be the
4 case that in the analysis that I do that
5 that turns -- that that becomes apparent,
6 anyone doing modeling will respond to the
7 facts and adapt the model to take account
8 of those issues. So if there is some
9 variation, variation is subject -- is
10 found in any --

11 I like to feel like I am talking
12 to you rather than --

13 Q. I am listening.

14 A. No, you weren't.

15 So variation can be
16 accommodated. The whole notion of doing
17 these types of models is to allow for
18 variation and using expectations, first
19 moments, averages that are -- that provide
20 accurate calculations for aggregate
21 impacts, and if the highly unlikely event
22 occurs that you're talking about, I will

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1 address it there. I mean this is a --
2 this is not unlike the questions about
3 whether this could be done in other drug
4 cases with variability, and it can be
5 done, and it has been demonstrated that it
6 can be done.

7 Q. So what you are saying is you are going to
8 come up with an average expectation for
9 the purpose of developing your yardstick?

10 A. The --

11 MR. SOBOL: Objection to the
12 form.

13 A. I'm -- as the OIG studies themselves did,
14 they came up with an average. They
15 stratified their -- the markups that they
16 saw over acquisition costs across
17 different types of pharmacies, different
18 types of classes of trade as you were
19 talking -- as you and Dr. Schondelmeyer
20 were talking about yesterday, and they
21 came up with an average, and the average
22 was pretty close to the differences for

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1 all of the different types of urban or
2 rural chains, independent pharmacies.

3 I am -- all of these models use
4 average, and this model will use averages
5 to come up with aggregate calculations of
6 what yardsticks should be and what
7 ultimately then damages are. As I have
8 demonstrated in attachment F, the use of
9 averages when done appropriately will give
10 you an exact calculation of a summation,
11 individual by individual, of what the
12 damages are.

13 Q. How is the Court supposed to deal with
14 class members whose expectations differ
15 from the average?

16 MR. SOBOL: Objection to the
17 form.

18 You may answer.

19 A. The -- at this point, I have been asked to
20 put forward a methodology to calculate
21 aggregate damages. I have indicated in
22 attachment F how I can look at the damages

12 (Pages 362 to 365)

<p style="text-align: right;">362</p> <p>1 in the overcharges related to individual</p> <p>2 groups of class members based on one</p> <p>3 measure of variation.</p> <p>4 I have not yet been -- I have</p> <p>5 not yet been asked to deal with all</p> <p>6 aspects of what will be needed at the</p> <p>7 allocation phase, and whether that is an</p> <p>8 issue is right now totally unclear to me.</p> <p>9 To the extent that it is, it will be</p> <p>10 something that if needed will be</p> <p>11 addressed. I will address it if asked to.</p> <p>12 Q. Has it occurred to you that some class</p> <p>13 members may have had no expectation as to</p> <p>14 what the relationship was between AWP and</p> <p>15 ASP?</p> <p>16 MR. SOBOL: Objection to the</p> <p>17 form.</p> <p>18 A. I don't quite understand. By "no</p> <p>19 expectation," you mean they saw an AWP and</p> <p>20 they never thought anything about it?</p> <p>21 What does that mean? What do you mean by</p> <p>22 "no expectation"?</p>	<p style="text-align: right;">364</p> <p>1 Q. What do you do about that class member?</p> <p>2 MR. SOBOL: Objection to the</p> <p>3 form.</p> <p>4 Q. Let me give you a concrete example. We'll</p> <p>5 take a look here at the deposition of</p> <p>6 Mr. Beaderstadt, which we have previously</p> <p>7 marked as Exhibit 10.</p> <p>8 (Handing Hartman Exhibit No. 010</p> <p>9 to the witness.)</p> <p>10 Q. I want you to turn to page 72.</p> <p>11 A. I am at 72. I am going to peruse just a</p> <p>12 little before -- to get some of the</p> <p>13 context.</p> <p>14 Q. Let me show you some of the testimony that</p> <p>15 I am interested in here, and then you can</p> <p>16 peruse all you want. Beginning at line 18</p> <p>17 on page 72, we have the following</p> <p>18 testimony:</p> <p>19 "Question: All right,</p> <p>20 Mr. Beaderstadt. Can I ask you generally</p> <p>21 what is your understanding of the term</p> <p>22 average wholesale price?</p>
<p style="text-align: right;">363</p> <p>1 Q. Well, let me refine it a bit. They saw an</p> <p>2 AWP, and it was their belief --</p> <p>3 A. That it --</p> <p>4 Q. -- that it had nothing whatsoever to do</p> <p>5 with the ASP.</p> <p>6 MR. SOBOL: Objection to the</p> <p>7 form.</p> <p>8 Q. How do you deal with that class member in</p> <p>9 your formulaic methodology?</p> <p>10 A. Well, as I understand your hypothetical,</p> <p>11 you are saying that they -- if a class</p> <p>12 member saw an AWP, had no idea what it --</p> <p>13 how it related to ASP, that essentially it</p> <p>14 had no concern about ASP, and it -- it</p> <p>15 just -- it used AWP as if it were a real</p> <p>16 price?</p> <p>17 Q. No. What I am saying is that the class</p> <p>18 member saw an AWP and understood and</p> <p>19 believed that it had no relationship to</p> <p>20 ASP.</p> <p>21 MR. SOBOL: Objection to the</p> <p>22 form.</p>	<p style="text-align: right;">365</p> <p>1 "Answer: Generally my</p> <p>2 understanding is that it is a benchmark</p> <p>3 that we use to price specific drugs in the</p> <p>4 physician's office and the pharmacies.</p> <p>5 "Question: Do you understand it</p> <p>6 to have a relationship to any actual</p> <p>7 acquisition cost?</p> <p>8 "Answer: I don't believe it has</p> <p>9 any relationship that is a consistent</p> <p>10 relationship."</p> <p>11 How are you going to deal with</p> <p>12 that class member --</p> <p>13 MR. SOBOL: Objection to the</p> <p>14 form.</p> <p>15 Q. -- in your formulaic methodology?</p> <p>16 A. Well --</p> <p>17 MR. SOBOL: Objection to the</p> <p>18 form.</p> <p>19 If you understand the question,</p> <p>20 "How are you going to deal with that class</p> <p>21 member," you may answer.</p> <p>22 A. I'm -- I'm now going to take a look at a</p>

<p style="text-align: right;">366</p> <p>1 bit of the preceding deposition testimony. 2 (Pause.) 3 (The witness viewing Hartman 4 Exhibit No. 010.) 5 A. The -- should a -- once -- once the 6 aggregate damages are calculated, as put 7 forward in my declaration, and should a 8 class member come forward with this set of 9 beliefs, this is someone who the, because 10 of his lack of understanding of the 11 relationship of AWP to ASP was 12 particularly harmed by the alleged AWP 13 scheme. This is someone who, if -- if in 14 the next question you had said to him, if 15 I told you that AWP -- that you use for 16 your reimbursement on AWP less 17 percent, 17 and AWP was 100 bucks, and you are paying 18 83 -- and suppose I told you that the AWP 19 was 10 dollars, and you would say, holy 20 God, this is somebody who was particularly 21 vulnerable to this scheme, and the AWP -- 22 the -- whatever the inflation was, that</p>	<p style="text-align: right;">368</p> <p>1 were not being passed on to him. They 2 should have been passed on to him through 3 an AWP that reflects -- that was a 4 reasonably -- that was a list price that 5 the public -- and this person seems 6 particularly uninformed -- could rely on, 7 and there was information concealed such 8 that that AWP did not reflect the pattern 9 of prices, and he paid that AWP when, 10 absent that concealment, the market as a 11 whole would have led to lower AWP's, 12 whatever he knew about ASP or AWP. 13 Q. What is your expectation yardstick going 14 to be for Mr. Beaderstadt if he shows up 15 in your survey and provides that answer? 16 MR. SOBOL: Objection to the 17 form. 18 A. The -- the meaning of and the information 19 built into the AWP as a signal for other 20 list prices and for transactions prices 21 reflect the sum of the results of 22 expectations for everybody as things -- as</p>
<p style="text-align: right;">367</p> <p>1 inflation led to an overcharge for this 2 person, and if the AWP should have been 3 20 percent less whatever he knew, those 4 are damages that he suffered. 5 Q. You don't know that that's going to be his 6 answer to the next question? You have to 7 ask him the next question to figure out 8 what his answer is going to be? Isn't 9 that true? 10 A. It is -- 11 MR. SOBOL: Objection to the 12 form. 13 A. It is true that had the defendants not 14 engaged in the conduct that has been 15 alleged here that the AWP would have 16 reflected a more consistent relationship 17 to ASP, and what is true is, absent the 18 alleged violations, the AWP would be 19 lower. Whatever this guy knew, and 20 whatever he tells me he knew, the AWP 21 would have been lower. The discounts that 22 were reflected in ASP, whatever he knows,</p>	<p style="text-align: right;">369</p> <p>1 prices are negotiated and given the 2 information that they have or what is 3 concealed from them, and so 4 Mr. Beaderstadt is someone who clearly has 5 very little information to give regarding 6 market expectations and what the reality 7 is between -- of what the relationship -- 8 of the benchmark of AWP is to WAC or to 9 ASP. He doesn't know. He has no 10 information to provide. 11 I'm looking for what the market 12 generally believed was the relationship 13 and could rely on given what was the 14 announced AWP of a drug and given what was 15 the actual transaction cost. 16 Mr. Beaderstadt obviously has no 17 information to bring to bear on what the 18 market thought, because he has done no 19 thinking about it. He is aware of 20 nothing. He is not aware of anything. 21 Q. So are you saying that you would provide 22 an expectation yardstick of 16 to</p>

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<p style="text-align: right;">370</p> <p>1 33 percent to him even though he testified</p> <p>2 that he didn't believe that AWP had any</p> <p>3 consistent relationship with ASP?</p> <p>4 MR. SOBOL: Objection to the</p> <p>5 form.</p> <p>6 A. Here is a man whose position I don't know.</p> <p>7 He is -- what is his -- is he -- is he the</p> <p>8 -- one of the chief officers of a small</p> <p>9 third-party payer? Is he a self- --</p> <p>10 represents a self-insured group? Who is</p> <p>11 he?</p> <p>12 Q. You have developed the opinions you have</p> <p>13 developed in this case without reading any</p> <p>14 of the depositions; is that correct?</p> <p>15 MR. SOBOL: I take it you are</p> <p>16 withdrawing the prior question?</p> <p>17 MR. EDWARDS: No, I'm not.</p> <p>18 MR. SOBOL: Well, then what</p> <p>19 question do you want him to answer?</p> <p>20 MR. EDWARDS: We will have the</p> <p>21 reporter read back the prior question,</p> <p>22 because I would be very interested in</p>	<p style="text-align: right;">372</p> <p>1 -- if Mr. Baderstadt had any interest in</p> <p>2 this market, he would have -- he would</p> <p>3 already know something here.</p> <p>4 So this is someone who, because</p> <p>5 he has very little understanding of the</p> <p>6 market as a whole, and what the market</p> <p>7 generally knows and reports the value to</p> <p>8 be between -- and the differences between</p> <p>9 AWP, WAC and ASP -- here is someone who</p> <p>10 knows nothing about that. And here is</p> <p>11 someone who is totally vulnerable to an</p> <p>12 inflation in AWP, because he has no idea</p> <p>13 what it means. He is taking it on faith.</p> <p>14 This is the type of person that</p> <p>15 if there were a securities fraud</p> <p>16 allegation, and you said in the perfect</p> <p>17 information example, does he have any</p> <p>18 information? He has none. He is not even</p> <p>19 thinking about it. A salesman could come</p> <p>20 in and take a stock off the New York Stock</p> <p>21 Exchange and say it is worth twice what it</p> <p>22 is selling for, and based on what I am</p>
<p style="text-align: right;">371</p> <p>1 getting an answer to the prior question.</p> <p>2 THE WITNESS: Can we finish what</p> <p>3 we are on here?</p> <p>4 MR. SOBOL: No, no.</p> <p>5 MR. EDWARDS: Let's have the</p> <p>6 reporter read back the prior question.</p> <p>7 (The reporter then read back as</p> <p>8 follows:</p> <p>9 "Question: So are you saying</p> <p>10 that you would provide an expectation</p> <p>11 yardstick of 16 to 33 percent to him even</p> <p>12 though he testified that he didn't believe</p> <p>13 that AWP had any consistent relationship</p> <p>14 with ASP?")</p> <p>15 A. The yardsticks that I ultimately develop</p> <p>16 are going to characterize the yardsticks</p> <p>17 for the market as a whole. They're going</p> <p>18 to characterize the relationships that</p> <p>19 whatever information was out there and how</p> <p>20 people viewed that information. The --</p> <p>21 and that -- I have already started to do</p> <p>22 that with survey information that informed</p>	<p style="text-align: right;">373</p> <p>1 reading here, he is -- he is not -- he is</p> <p>2 uninformed.</p> <p>3 And I am characterizing a single</p> <p>4 -- a yardstick that characterizes the</p> <p>5 average of the market understanding of the</p> <p>6 difference between AWP, WAC, and ASP. So</p> <p>7 it is him, it is going to be the same --</p> <p>8 the yardstick is going to be the same for</p> <p>9 everybody.</p> <p>10 Q. So the answer to my question is yes, you</p> <p>11 would apply the average yardstick to</p> <p>12 Mr. Baderstadt and other class members</p> <p>13 even though they may have had expectations</p> <p>14 that were different from the average?</p> <p>15 MR. SOBOL: Objection.</p> <p>16 A. I'm going to apply the yardstick for the</p> <p>17 market as a whole to characterize the AWP</p> <p>18 as a whole to the market as a whole and</p> <p>19 for everybody: for Mr. Baderstadt, for</p> <p>20 Mr. Jones who is the CFO of CIGNA, and the</p> <p>21 -- each of those -- those -- those two</p> <p>22 individuals have -- have different</p>

<p style="text-align: right;">374</p> <p>1 knowledge, different abilities to</p> <p>2 negotiate. This is clearly someone who,</p> <p>3 given the inflation in AWP, has no idea</p> <p>4 how badly he is being gored by an</p> <p>5 overcharge.</p> <p>6 Q. You testified a moment ago that discounts</p> <p>7 should have been passed on to</p> <p>8 Mr. Baderstadt and they weren't. What</p> <p>9 discounts were you talking about?</p> <p>10 A. Did I say that? Do we have that in the --</p> <p>11 where I said the discounts should have</p> <p>12 been passed on?</p> <p>13 Q. You don't recall saying that?</p> <p>14 A. I recall discussing ASP. I recall</p> <p>15 discussing AWP. I recall discussing the</p> <p>16 fact that the AWP was higher for</p> <p>17 Mr. Baderstadt when he was negotiating</p> <p>18 reimbursement rates. And so if I said a</p> <p>19 discount, the -- what I -- if -- then I</p> <p>20 misspoke.</p> <p>21 What he -- he should have been</p> <p>22 facing the AWP that the firm -- that the</p>	<p style="text-align: right;">376</p> <p>1 referred to it as an overcharge.</p> <p>2 Q. Are you saying that Mr. Baderstadt's</p> <p>3 company would have been able to acquire</p> <p>4 the drug from the PBM that they deal with</p> <p>5 for a price less than the PBM paid for it?</p> <p>6 A. No.</p> <p>7 Q. Okay. Are you saying that the PBM would</p> <p>8 have been able to acquire the drug from</p> <p>9 the pharmacy that dispensed the drug at a</p> <p>10 price that is less than the pharmacy paid</p> <p>11 for it?</p> <p>12 MR. SOBOL: Objection to the</p> <p>13 form.</p> <p>14 A. We seem to be returning to the</p> <p>15 hypothetical that you were articulating at</p> <p>16 the end of the day yesterday, and the</p> <p>17 point of all of this and the, as I recall</p> <p>18 the hypothetical, I don't have the numbers</p> <p>19 in front of me, you were saying, well,</p> <p>20 look, AWP is at 125 -- \$1.25 -- let's say</p> <p>21 125. It makes things easier. WAC is 100,</p> <p>22 and then there were various discounts</p>
<p style="text-align: right;">375</p> <p>1 defendants should have been setting,</p> <p>2 absent the alleged scheme, would have been</p> <p>3 in line with the market expectations, the</p> <p>4 yardsticks that I will use, and the AWP</p> <p>5 would have been lower -- if the AWP had</p> <p>6 been a hundred to him in the actual class</p> <p>7 period, and based on what the AWP's were</p> <p>8 and what the relationship that the market</p> <p>9 understood was between ASP and AWP, the</p> <p>10 AWP for Mr. Baderstadt should have been</p> <p>11 \$75.</p> <p>12 That difference would have been</p> <p>13 reflected in a discount to him. He would</p> <p>14 have been paying 100 minus let's say AWP</p> <p>15 less 17 percent, he would be paying</p> <p>16 83 percent. In the but-for world, he</p> <p>17 would have been paying \$75 less</p> <p>18 17 percent. And that's the discount --</p> <p>19 that's the reduction -- those are the</p> <p>20 overcharges that he would not have been</p> <p>21 overcharged, and if I called that a</p> <p>22 discount, I didn't -- I should have</p>	<p style="text-align: right;">377</p> <p>1 below. And then I said in the but-for</p> <p>2 world AWP would have been \$85, and there</p> <p>3 would have been a reimbursement off of the</p> <p>4 but-for AWP. And you kept saying, well,</p> <p>5 but wait. WAC -- they are still buying it</p> <p>6 at 80 -- 100 dollars. How could they be</p> <p>7 buying it at 100 dollars and selling it</p> <p>8 for 87 -- 85, 87, less the percentage?</p> <p>9 The point is WAC and AWP are</p> <p>10 joined at the hip, so that if AWP goes</p> <p>11 down for Mr. Baderstadt, WAC is going to</p> <p>12 go down, because it is a formulaic -- it</p> <p>13 is 80 percent of AWP for the drugs that</p> <p>14 have that relationship.</p> <p>15 The but-for AWP leads to a but-</p> <p>16 for WAC leads to a reduction in those list</p> <p>17 prices from the manufacturer through the</p> <p>18 wholesaler through the retailer through</p> <p>19 the PBM to the third-party payer, and all</p> <p>20 of those prices -- WAC and AWP would have</p> <p>21 been lower, and the discounts that were</p> <p>22 offered to the middlemen would have</p>

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<p style="text-align: right;">378</p> <p>1 reached the class members because the AWP</p> <p>2 was in line with the ASP, the WAC was in</p> <p>3 line with the ASP, and all the</p> <p>4 negotiations off of AWP and WAC that are</p> <p>5 reflected in the contracts between the</p> <p>6 various entities would have been lower by</p> <p>7 that amount.</p> <p>8 MR. EDWARDS: I am going to ask</p> <p>9 the reporter to read back the question --</p> <p>10 well, strike that.</p> <p>11 I am going to move to strike the</p> <p>12 answer on the ground that it is not</p> <p>13 responsive.</p> <p>14 I am going to ask the reporter</p> <p>15 to read back the question, and insert the</p> <p>16 question again in the record, and I'm</p> <p>17 going to ask the witness to give me a</p> <p>18 responsive answer to the question.</p> <p>19 MR. SOBOL: Well, objection to</p> <p>20 the form. Asked and answered.</p> <p>21 (The reporter then read back as</p> <p>22 follows:</p>	<p style="text-align: right;">380</p> <p>1 MR. SOBOL: Objection. Asked</p> <p>2 and answered.</p> <p>3 A. No. Asked and answered.</p> <p>4 Q. Are you saying that the pharmacy would be</p> <p>5 able to acquire the drug from the</p> <p>6 wholesaler at a price that is less than</p> <p>7 the wholesaler paid for it?</p> <p>8 MR. SOBOL: Objection. Asked</p> <p>9 and answered.</p> <p>10 A. The -- no.</p> <p>11 Q. And I believe you testified yesterday that</p> <p>12 you have no basis for opining that the</p> <p>13 manufacturer in your but-for world would</p> <p>14 sell the drug to the wholesaler at a price</p> <p>15 that is less than the price that the</p> <p>16 manufacturer sells the drug to the</p> <p>17 wholesaler for in the actual world.</p> <p>18 Correct?</p> <p>19 MR. SOBOL: Objection.</p> <p>20 Mischaracterizes the testimony.</p> <p>21 A. No. I never said that.</p> <p>22 Q. Well, do you agree with that?</p>
<p style="text-align: right;">379</p> <p>1 "Question: Okay. Are you</p> <p>2 saying that the PBM would have been able</p> <p>3 to acquire the drug from the pharmacy that</p> <p>4 dispensed the drug at a price that is less</p> <p>5 than the pharmacy paid for it?")</p> <p>6 MR. SOBOL: Objection. Asked</p> <p>7 and answered.</p> <p>8 BY MR. EDWARDS:</p> <p>9 Q. Can you give me a more responsive answer</p> <p>10 to that question?</p> <p>11 MR. SOBOL: I object to that</p> <p>12 question.</p> <p>13 A. And I am sorry. Read it back. I was</p> <p>14 expecting another sentence, and then I</p> <p>15 was --</p> <p>16 (The reporter then again read</p> <p>17 back as follows:</p> <p>18 "Question: Okay. Are you</p> <p>19 saying that the PBM would have been able</p> <p>20 to acquire the drug from the pharmacy that</p> <p>21 dispensed the drug at a price that is less</p> <p>22 than the pharmacy paid for it?")</p>	<p style="text-align: right;">381</p> <p>1 MR. SOBOL: Objection. Asked</p> <p>2 and answered.</p> <p>3 A. It has been asked and answered.</p> <p>4 Q. Well, your theory is that the ASP in the</p> <p>5 but-for world and the actual world would</p> <p>6 be the same? Correct?</p> <p>7 A. Correct.</p> <p>8 Q. And in order for the ASP to be the same,</p> <p>9 it would follow that the price that the</p> <p>10 manufacturer charges the wholesaler in the</p> <p>11 hypothetical we're dealing with here would</p> <p>12 also have to be the same?</p> <p>13 A. No.</p> <p>14 Q. Correct?</p> <p>15 A. Are we talking about -- when we say "the</p> <p>16 price," are you talking about WAC?</p> <p>17 Q. I am talking about the dollars that the</p> <p>18 wholesaler actually pays the manufacturer</p> <p>19 for the drug. Forget about WAC. I am</p> <p>20 talking about the dollars.</p> <p>21 A. The --</p> <p>22 MR. SOBOL: Well, objection.</p>

<p style="text-align: right;">382</p> <p>1 You can answer, if you can.</p> <p>2 A. The dollars -- under contract, what the</p> <p>3 wholesaler pays the manufacturer is WAC,</p> <p>4 and then there is an adjustment with</p> <p>5 chargebacks, depending on other</p> <p>6 negotiations, and WAC would be lower.</p> <p>7 Q. You're not suggesting, are you, that the</p> <p>8 net price that the wholesaler pays would</p> <p>9 be lower?</p> <p>10 A. The -- I am suggesting that WAC would be</p> <p>11 lower. I am not just suggesting it. I'm</p> <p>12 averring it. And to the extent that the</p> <p>13 chargebacks would vary in a particular way</p> <p>14 is -- has not been relevant to the</p> <p>15 calculation needed to relate AWP to ASP.</p> <p>16 Q. Let's say we're talking about a drug for</p> <p>17 which there are no chargebacks. In that</p> <p>18 situation, are you saying that the</p> <p>19 manufacturer would lower its price to the</p> <p>20 wholesaler?</p> <p>21 MR. SOBOL: Objection to form.</p> <p>22 You may answer.</p>	<p style="text-align: right;">384</p> <p>1 A. The revenue the manufacturers are taking</p> <p>2 in is related to the ASP.</p> <p>3 Q. And that's going to remain the same?</p> <p>4 A. That's going to remain the same.</p> <p>5 Q. I think you testified yesterday that it</p> <p>6 was your understanding that the pharmacy</p> <p>7 class of trade generally pays more for</p> <p>8 drugs than the hospital class of trade?</p> <p>9 MR. SOBOL: Objection to the</p> <p>10 form. Mischaracterizes the testimony.</p> <p>11 Q. Is that correct?</p> <p>12 MR. SOBOL: Objection. It</p> <p>13 mischaracterizes the testimony.</p> <p>14 A. I would -- I would want to look at the</p> <p>15 data again. It has been too long.</p> <p>16 Q. Do you agree that in many cases pharmacies</p> <p>17 pay more than hospitals?</p> <p>18 A. I wouldn't -- there are clearly</p> <p>19 differences across classes of trade, and</p> <p>20 your proposition sounds correct to me, but</p> <p>21 I would want to go back and check the data</p> <p>22 that I reviewed in that regard, and it has</p>
<p style="text-align: right;">383</p> <p>1 A. Institutionally wholesalers buy at WAC.</p> <p>2 WAC is wholesale acquisition cost. And in</p> <p>3 the but-for world, I can't have said it</p> <p>4 more explicitly. WAC and AWP are related</p> <p>5 -- are tied at the hip formulaically. And</p> <p>6 given that there was an AWP scheme, an AWP</p> <p>7 inflation scheme, there was a WAC</p> <p>8 inflation scheme.</p> <p>9 So absent the scheme in the</p> <p>10 but-for world, whatever the ASP was, I</p> <p>11 want to know what the but-for WAC and AWP</p> <p>12 were, and that's what the yardsticks will</p> <p>13 inform, and WAC will be lower.</p> <p>14 And so if you are -- under your</p> <p>15 -- the question you just asked, there are</p> <p>16 no chargebacks; there are no other</p> <p>17 financial consideration, flows between the</p> <p>18 wholesaler and the manufacturer. WAC will</p> <p>19 be lower, and the wholesalers will acquire</p> <p>20 it at a lower cost.</p> <p>21 Q. So the manufacturers will take in less</p> <p>22 revenue?</p>	<p style="text-align: right;">385</p> <p>1 been a number of years since I looked at</p> <p>2 that question in particular.</p> <p>3 Q. Well, in the hypothetical we have been</p> <p>4 talking about with Mr. Beaderstadt's</p> <p>5 company, John Deere, dealing with a PBM</p> <p>6 and a pharmacy, are you suggesting that in</p> <p>7 the but-for world the manufacturer would</p> <p>8 give the pharmacy the same discount that</p> <p>9 the hospital gets?</p> <p>10 MR. SOBOL: Objection to the</p> <p>11 form.</p> <p>12 A. I'm taking the actual world as the actual</p> <p>13 world, and I'm taking the discounts and</p> <p>14 all the price offsets we're paying -- that</p> <p>15 were paid as having been paid, and what</p> <p>16 I'm looking for is had there not been a</p> <p>17 misrepresentation of the relationship of</p> <p>18 those prices, which reflected whatever</p> <p>19 differential payments there were, averages</p> <p>20 in the average sale price by class of</p> <p>21 trade is reflected in the average to the</p> <p>22 company as a whole times the units sold,</p>

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<p style="text-align: right;">386</p> <p>1 and that's the total revenue earned.</p> <p>2 What I am saying is that the</p> <p>3 drug companies started discounting drugs</p> <p>4 to all their classes of trade -- well, to</p> <p>5 classes of trade over the '90s such that</p> <p>6 the ASP declined, and there were</p> <p>7 discounts, and discounts are good when</p> <p>8 they're passed on to the end payers, when</p> <p>9 they are passed on to the consumers.</p> <p>10 The point is that because of</p> <p>11 this lack of transparency, the AWP's did</p> <p>12 not decline. They remained inflated. So</p> <p>13 I am taking the actual revenues that the</p> <p>14 companies earned and whatever they did pay</p> <p>15 -- whether it was to John Deere -- you</p> <p>16 know, whether it affected John Deere</p> <p>17 differentially, whatever -- it is coming</p> <p>18 up -- I am taking the overall summary of</p> <p>19 all the manufacturers' behavior and what</p> <p>20 they did and what they earned, and they</p> <p>21 would have earned the same amount, and</p> <p>22 what I am saying is that they were willing</p>	<p style="text-align: right;">388</p> <p>1 structure didn't pass on those discounts</p> <p>2 to consumers.</p> <p>3 Q. Who --</p> <p>4 A. They passed them on to middle persons.</p> <p>5 Q. Who overcharged the class members?</p> <p>6 A. The allegation is, as I have been asked to</p> <p>7 assume, that AWP's and WAC's are set by the</p> <p>8 manufacturers, which my research and</p> <p>9 analysis have corroborated, and, hence,</p> <p>10 since they're setting that benchmark price</p> <p>11 and it is not reflecting the real</p> <p>12 discounts that they're willing to offer</p> <p>13 and the real revenues, that's the source</p> <p>14 of the increased divergence that was</p> <p>15 concealed from the class.</p> <p>16 Q. I asked you who.</p> <p>17 A. And I said the source was the AWP's and the</p> <p>18 people who set the AWP's.</p> <p>19 THE WITNESS: Can we take a one-</p> <p>20 minute break?</p> <p>21 MR. EDWARDS: Sure.</p> <p>22 (Recess taken at 10:48 a.m.)</p>
<p style="text-align: right;">387</p> <p>1 to offer those discounts, and that is</p> <p>2 reflected in their revenues, which is</p> <p>3 total average sale price times total</p> <p>4 number of units sold to all the classes of</p> <p>5 trade, and -- and -- I'm saying what</p> <p>6 happened to reimbursements given these</p> <p>7 discounts that were offered? Well, did</p> <p>8 they get to customers? Did they get to</p> <p>9 third-party payers? And the answer is</p> <p>10 based on the fact that this -- there is</p> <p>11 this spread that increased as considerably</p> <p>12 that it did and the fact that the</p> <p>13 third-party payers didn't understand the</p> <p>14 extent of this that they were overcharged.</p> <p>15 So I am taking into account what</p> <p>16 John Deere was paying, and whether</p> <p>17 hospitals got the breaks they did, that is</p> <p>18 built in to -- in my but-for world, I take</p> <p>19 the revenues as given. They would have</p> <p>20 earned exactly what they would have</p> <p>21 earned, which is what they wanted to earn.</p> <p>22 The point is the reimbursement</p>	<p style="text-align: right;">389</p> <p>1 (Recess ended at 10:56 a.m.)</p> <p>2 BY MR. EDWARDS:</p> <p>3 Q. Are you saying that certain discounts were</p> <p>4 not passed on by the middle men to the</p> <p>5 class members?</p> <p>6 A. That, I am saying that. I am saying that</p> <p>7 evidence indicates that. Yes. I am</p> <p>8 saying recent litigation indicates that.</p> <p>9 Q. And so what you are saying is that in the</p> <p>10 but-for world the class members would pay</p> <p>11 less and the middle men were making less?</p> <p>12 MR. SOBOL: Objection to the</p> <p>13 form.</p> <p>14 A. I'm saying in the but-for world that the</p> <p>15 AWP would have a -- would have had a</p> <p>16 relationship to ASP that was expected and</p> <p>17 understood to be the case by the class,</p> <p>18 and it would have been lower, and the</p> <p>19 reimbursements paid would have been less.</p> <p>20 Q. Do you know what pharmacy margins are?</p> <p>21 MR. SOBOL: Objection to the</p> <p>22 form.</p>

<p style="text-align: right;">390</p> <p>1 A. I have been curious to find that out. I 2 hope to. 3 Q. Is the pharmacy business competitive to 4 your knowledge? 5 A. "Competitive" is a -- is a broad term. I 6 mean is it Adamistically competitive? Is 7 it oligopolistically competitive? I mean 8 what kind of competition are you talking 9 about? 10 Q. I am just asking you a question. Is it 11 competitive or not? Are you saying it is 12 not competitive? 13 A. I -- 14 MR. SOBOL: Objection to the 15 form. 16 A. I am saying there are so many types of 17 competition. There is oligopolistic 18 competition. There is Adamistic 19 competition, each of which has different 20 implications about profit margins, and I'm 21 not sure. So that unless you are more 22 specific, I can't follow a line of</p>	<p style="text-align: right;">392</p> <p>1 MR. EDWARDS: Strike that. 2 Q. What do they say? 3 A. Well, they say that if there are discounts 4 paid, let us -- and let's take a specific 5 example, generic drugs, wherein -- as I -- 6 as I say in my report, there is evidence 7 that ASPs drop by 80 to 90 percent of the 8 prelaunch branded price. They drop 9 considerably. And when one looks at 10 reimbursement rates, looking at either 11 data directly from retailers or from 12 third-party payers or from the IMS 13 national prescription audit, it shows that 14 reimbursement rates drop to 20 -- 15 to 15 30 percent. So it is fair to say that 16 what is being paid by the class, the types 17 of discounts that occur there, are much 18 less than the amounts that the retailers 19 -- the discounts at which the drugs are 20 available to retailers. Now if they are 21 able to retain part of that spread, it 22 will have implications for the</p>
<p style="text-align: right;">391</p> <p>1 questions unless I know what type of 2 competition you are referring to. 3 Q. Is it competitive in any way? 4 A. Do -- do you mean does Eckard attempt to 5 increase and grow and make profits 6 relative to CVS? Yes. It is competitive 7 in that way. 8 Q. Have you done an analysis of market shares 9 in the pharmacy business? 10 A. I have preliminarily asked for such 11 information and have not been able to 12 develop it sufficiently to the point at 13 which I submitted the declaration. 14 Q. This is something you intend to do for 15 purposes of your testimony in this case? 16 A. If needed. 17 Q. Why would it be relevant to know whether 18 the pharmacy sector is competitive? 19 A. The implications of the allegations say 20 certain things about margins of retail 21 pharmacies. 22 Q. So, in other words, if --</p>	<p style="text-align: right;">393</p> <p>1 profitability of the retailers. 2 Q. I notice you made that same point in 3 paragraph 13C of your report at page 13. 4 A. Can I return the Baderstadt transcript 5 for now? 6 Q. Sure. 7 (Hanging Hartman Exhibit No. 010 8 to Mr. Edwards.) 9 A. And I am sorry. You said page 13 of the 10 main body of my report? 11 Q. Yes. 12 A. Yes. Okay. 13 (Witness complying.) 14 Q. Subparagraph 13C. What is the basis for 15 those numbers where you say, "Over the 16 past decade as multiple generics have 17 launched, generic manufacturer average 18 prices have fallen by 80 to 90 percent. 19 At the same time, however, average 20 reimbursement rates paid by retailers -- 21 paid to retailers by end payer class 22 members have fallen by only 20 to</p>

20 (Pages 394 to 397)

<p style="text-align: right;">394</p> <p>1 30 percent"? What is the basis for that?</p> <p>2 A. In the work that I have done over the last</p> <p>3 decade with respect to this industry, both</p> <p>4 publicly-available data and data that has</p> <p>5 been subject to seal, I have been able to</p> <p>6 review, and this summarizes the</p> <p>7 information that I have found from both of</p> <p>8 those sources.</p> <p>9 Q. Well, there is -- this particular</p> <p>10 statement in your report is not footnoted.</p> <p>11 Can you identify the specific sources from</p> <p>12 which you derive that information?</p> <p>13 A. I certainly can't identify the cases from</p> <p>14 whence I have observed that, the matters</p> <p>15 of litigation in which I have submitted</p> <p>16 testimony.</p> <p>17 Q. Why is that?</p> <p>18 A. Well, they are subject to seal.</p> <p>19 Now the judge in the Terazosin</p> <p>20 matter and in Cipro have issued their own</p> <p>21 opinions. I don't know whether that makes</p> <p>22 the other damage analyses I have done -- I</p>	<p style="text-align: right;">396</p> <p>1 that?</p> <p>2 MR. SOBOL: Well, I will say</p> <p>3 that if the defendant manufacturers will</p> <p>4 waive the confidentiality restrictions on</p> <p>5 their data from the other cases, including</p> <p>6 your clients, we could consider disclosure</p> <p>7 of it, but, you know, many of the</p> <p>8 defendants here, as counsel know, were</p> <p>9 defendants in the multiple matters that</p> <p>10 Dr. Hartman has just now testified about,</p> <p>11 and if they would be willing to, you know,</p> <p>12 assent to the release of the information,</p> <p>13 then we can also deal with the co-lead</p> <p>14 counsel for those other cases and make it</p> <p>15 available to you. BMS in particular has</p> <p>16 provided significant information about a</p> <p>17 drug in which Dr. Hartman's testimony is</p> <p>18 germane.</p> <p>19 BY MR. EDWARDS:</p> <p>20 Q. If Dr. Schondelmeyer is of the opinion</p> <p>21 that the pharmacy business is highly</p> <p>22 competitive and margins are thin, would</p>
<p style="text-align: right;">395</p> <p>1 don't know if that makes them public or</p> <p>2 not. It is my understanding that that --</p> <p>3 that that is all subject to seal.</p> <p>4 I have looked at data for 10, 15</p> <p>5 drugs in Hatch-Waxman matters and a</p> <p>6 variety of cases where there have been</p> <p>7 generic launches, and I have gotten real</p> <p>8 manufacturer data over the past 10 years.</p> <p>9 I have also looked at publicly-available</p> <p>10 information. I mean your Barron's article</p> <p>11 that you put in front of me yesterday said</p> <p>12 the same thing. So I could go to that 60</p> <p>13 to 90 percent in the Barron's article and</p> <p>14 the IMS data, which I could buy -- you or</p> <p>15 I could buy -- and will show you that the</p> <p>16 reimbursement rates that they are talking</p> <p>17 about have not fallen 60 to 90 percent.</p> <p>18 So it is confirmed by popular</p> <p>19 press. It is confirmed by IMS. It is</p> <p>20 confirmed by data from manufacturers, you</p> <p>21 know, from their own sales data.</p> <p>22 Q. You're not able to be more specific than</p>	<p style="text-align: right;">397</p> <p>1 you defer to him in that regard?</p> <p>2 A. No.</p> <p>3 Q. You would disagree with him?</p> <p>4 A. I wouldn't defer to him. I would have to</p> <p>5 look at whatever analysis he has done. It</p> <p>6 runs counter to my understanding.</p> <p>7 Dr. Schondelmeyer is an expert in his area</p> <p>8 of pharmacology. To the extent that he is</p> <p>9 an economist and to the extent that his</p> <p>10 notion of being very competitive and what</p> <p>11 the particular margins he is looking at,</p> <p>12 you know, I just don't know what he is</p> <p>13 basing it on. I would have to review</p> <p>14 that. You know, what he -- he could have</p> <p>15 said that in some context. I have seen</p> <p>16 two duopolists that are pricing at almost</p> <p>17 at monopolist price, and say, "Jesus, is</p> <p>18 this really a competitive industry?" I</p> <p>19 would have to see the context and</p> <p>20 understand what he is basing that on.</p> <p>21 Q. Is the PBM business competitive?</p> <p>22 MR. SOBOL: Objection to the</p>

<p style="text-align: right;">398</p> <p>1 form.</p> <p>2 A. The PBM business does compete -- it -- by</p> <p>3 offering products to, complex products, to</p> <p>4 third-party payers to try and get the</p> <p>5 third-party payers to join -- to join that</p> <p>6 PBM or have that PBM be their -- to be --</p> <p>7 to get them to be a client to that PBM.</p> <p>8 Q. Have you seen the statement of the FTC in</p> <p>9 connection with the Caremark/AdvancePCS</p> <p>10 merger?</p> <p>11 A. I don't recall. It is not here, I take</p> <p>12 it.</p> <p>13 MR. EDWARDS: We are going to</p> <p>14 mark it as Exhibit 16. For the record, it</p> <p>15 is a statement of the Federal Trade</p> <p>16 Commission in the matter of Caremark RX,</p> <p>17 Inc./AdvancePCS, file number 031 0239.</p> <p>18 (Three-page Statement of the</p> <p>19 Federal Trade Commission in the</p> <p>20 Matter of Caremark RX,</p> <p>21 Inc./AdvancePCS, File</p> <p>22 No. 031 0239 marked</p>	<p style="text-align: right;">400</p> <p>1 terms of defining relevant markets,</p> <p>2 looking at using the merger guidelines to</p> <p>3 assess structural measures of</p> <p>4 concentration, and that may be -- it may</p> <p>5 -- that may occur as a result of the</p> <p>6 merger. It looks at competitive issues</p> <p>7 that may be relevant and more important</p> <p>8 than the structural aspects of the merger.</p> <p>9 It is interested in allowing mergers to</p> <p>10 go forward that are procompetitive but</p> <p>11 stopping those that will be anti-</p> <p>12 competitive.</p> <p>13 Q. One of the things it will do is obtain</p> <p>14 documents from the merging parties?</p> <p>15 Correct?</p> <p>16 A. That's correct.</p> <p>17 Q. Sometimes hundreds of thousands of pages</p> <p>18 of documents?</p> <p>19 A. It could be first requests, second</p> <p>20 requests. There could be many levels of</p> <p>21 amounts of documents required, depending</p> <p>22 on the complexity of the merger.</p>
<p style="text-align: right;">399</p> <p>1 Exhibit Hartman 016 for</p> <p>2 identification.)</p> <p>3 BY MR. EDWARDS:</p> <p>4 Q. Have you ever seen this document before?</p> <p>5 A. I do not think so. I am sorry. It is</p> <p>6 dated when? Do we know this?</p> <p>7 Q. You know, this particular copy does not</p> <p>8 have a date.</p> <p>9 A. It is citing things in the footnote as of</p> <p>10 Web searches as of 2004, which would lead</p> <p>11 me to think it is fairly recent, but</p> <p>12 whether that might have been added</p> <p>13 afterwards, I don't know.</p> <p>14 Q. Have you ever done any work with the FTC?</p> <p>15 A. I have.</p> <p>16 Q. Do you know what the FTC does in analyzing</p> <p>17 a merger?</p> <p>18 A. Generally.</p> <p>19 Q. What does it do?</p> <p>20 A. Well, it assesses -- it does the standard</p> <p>21 types of merger analysis that the DOJ or</p> <p>22 would be done by government authorities in</p>	<p style="text-align: right;">401</p> <p>1 Q. It takes or it can take testimony from</p> <p>2 witnesses in connection with the merger?</p> <p>3 A. I would -- yes.</p> <p>4 Q. And the FTC has economists on staff to</p> <p>5 analyze the economic effects of a merger?</p> <p>6 A. They do.</p> <p>7 Q. Are you in a position to disagree with the</p> <p>8 statement made in footnote 6 on page 3 of</p> <p>9 this document, quote, "We anticipate that</p> <p>10 competition among PBMs will remain</p> <p>11 vigorous in the wake of the Caremark/</p> <p>12 AdvancePCS acquisition, and that this</p> <p>13 competition is likely to cause PBMs to</p> <p>14 pass on at least some of their cost</p> <p>15 savings to their customers in order to</p> <p>16 gain or retain their business"?</p> <p>17 MR. SOBOL: Objection to the</p> <p>18 form.</p> <p>19 A. I have read that footnote.</p> <p>20 Q. Do you disagree with that footnote?</p> <p>21 A. The -- I would frame it as follows.</p> <p>22 First, here is a statement of the Federal</p>

22 (Pages 402 to 405)

<p style="text-align: right;">402</p> <p>1 Trade Commission. I'm not sure at what 2 stage of pleading this is. I know in 3 matters -- say in other matters related to 4 Hatch-Waxman cases, say the drug K-dur, 5 there were opinions about what was 6 anticompetitive and procompetitive. I 7 don't know if this was the final decision 8 of the commission or what this reflects 9 and at what stage this is, so whether this 10 is the final conclusion. So that is 11 number one.</p> <p>12 Since I have, you have -- you 13 have given me a footnote out of a document 14 that is a three-page summary, which -- the 15 providence of which is -- I see no header 16 or footer. It just says statement of the 17 Federal Trade Commission. So I put the 18 footnote in that context, whether this is 19 the final decision of the Federal Trade 20 Commission, since there are appeals and 21 there are changes that can occur over 22 time.</p>	<p style="text-align: right;">404</p> <p>1 recent litigation -- it has been reported 2 on in 2004 -- where they believe that 3 their PBM -- they are not receiving 4 whatever the competition was for the 5 rebates. They believe they're not 6 receiving their full share of those 7 rebates. So while there was competition, 8 they are feeling it is not being passed on 9 the way to which it had been agreed.</p> <p>10 I have also read in that same 11 journal, a Drug Cost Management Report, of 12 a very recent effort on 50 of the Fortune 13 500 companies that are essentially forming 14 their own PBM because even though they say 15 they're getting competitive offers, 16 they're saying, "We don't see the results 17 of whatever you are promising, and we have 18 seen this kind of evidence, and we're not 19 getting our discounts."</p> <p>20 And there was another article I 21 wanted to cite I have now forgotten.</p> <p>22 Q. Well, one of the things that payers can do</p>
<p style="text-align: right;">403</p> <p>1 Secondly, there is academic work 2 that has been done that indicates that 3 while the PBM industry or the group of 4 PBMs appear to compete, in order to get 5 insured lives and to get TPP members that 6 there is a great opportunity for post 7 contractual opportunistic behavior which 8 given the veil of relationships of pricing 9 is unclear to the customers, to the 10 clients, for whom they have apparently 11 competed. So that there -- the notion of 12 competition here in terms of 13 precontractual competition may be quite 14 different than the results of the post 15 contractual implementation, and the post 16 contractual implementation may look far 17 different from what would be felt to be a 18 competitive result.</p> <p>19 And, thirdly, I have seen 20 litigation that we have talked about 21 yesterday on the State of Vermont and New 22 York State, and this is -- this has been</p>	<p style="text-align: right;">405</p> <p>1 if they don't like the deals they're 2 getting from PBMs is they can form their 3 own PBMs? Correct?</p> <p>4 A. The -- one of the things that is my 5 interpretation -- I -- this is -- I have 6 been asked to assume allegations; I have 7 looked for corroboration. One of the 8 corroborating factors of the allegations 9 are exactly that effort: that the 10 understanding of the extent to which this 11 AWP inflation scheme was occurring has 12 finally reached the level of strategic 13 planning of the self-insured groups large 14 companies, and they're saying forget it. 15 This is not -- for 10 years, we're not 16 getting the results of what you said were 17 competitive contracts, and they are either 18 forming their own, or they are forcing 19 Caremark or other PBMs to offer more 20 transparent -- the new -- the new product, 21 as I understand it, in the PBM world is 22 greater transparency.</p>

<p style="text-align: right;">406</p> <p>1 So suddenly after 10, 15 years</p> <p>2 of an alleged scheme and information that</p> <p>3 is suddenly -- that is slowly affecting</p> <p>4 expectations and understanding, so that</p> <p>5 the concealment is now -- the genie is out</p> <p>6 of the bottle. There are these responses.</p> <p>7 But the notion that there has been</p> <p>8 competition over the last five or ten</p> <p>9 years is certainly belied by this kind of</p> <p>10 activity of forming their own PBMs now or</p> <p>11 deciding that they have to specifically</p> <p>12 force the PBMs -- that they now understand</p> <p>13 what it is they have to do with the PBMs</p> <p>14 to get the transparency so they understand</p> <p>15 the wedge between reimbursement rates and</p> <p>16 what it is costing the PBMs or the</p> <p>17 retailers to get the pharmaceuticals.</p> <p>18 Q. So a payer that has formed its own PBM</p> <p>19 would not be injured by the AWP scheme, at</p> <p>20 least once it formed its own PBM? Is that</p> <p>21 what you are saying?</p> <p>22 MR. SOBOL: Objection to form.</p>	<p style="text-align: right;">408</p> <p>1 Q. So you are basing that opinion on</p> <p>2 literature searches?</p> <p>3 A. I --</p> <p>4 MR. SOBOL: Objection.</p> <p>5 A. I am basing that -- this opinion on the</p> <p>6 identification -- the ability for me to</p> <p>7 identify PBMs or purchasing groups, GPOs,</p> <p>8 that were working for third-party payers</p> <p>9 that performed a PBM's function, and the</p> <p>10 finding, and my understanding is that to</p> <p>11 the extent that it may have happened in,</p> <p>12 you know, in small numbers of cases, the</p> <p>13 real -- the real change, the real</p> <p>14 watershed has been maybe since the Lupron</p> <p>15 sentencing memorandum and since the</p> <p>16 industry has become to understand -- has</p> <p>17 come to understand how vastly different</p> <p>18 acquisition costs are from what they are</p> <p>19 reimbursing.</p> <p>20 Q. I take it you have not conducted any</p> <p>21 independent inquiry to determine the</p> <p>22 extent to which the phenomenon that you</p>
<p style="text-align: right;">407</p> <p>1 A. I am saying that a set of payers that were</p> <p>2 sufficiently capable of piercing the veil</p> <p>3 of this lack of -- this nontransparency,</p> <p>4 the spreads that were going on, can begin</p> <p>5 to reduce and perhaps if, with enough</p> <p>6 information, eliminate the overcharge once</p> <p>7 they have gotten into that position, and I</p> <p>8 -- however, that is something that I, as I</p> <p>9 understand it, has started this year, and</p> <p>10 the extent of the success of that</p> <p>11 implementation is still unclear to me, and</p> <p>12 I think it is an evolving part of this</p> <p>13 industry.</p> <p>14 Q. You say it is your understanding that it</p> <p>15 started this year. How do you know that</p> <p>16 there are not payers out there who started</p> <p>17 it earlier than this year?</p> <p>18 MR. SOBOL: Objection.</p> <p>19 A. The literature searches that I have asked</p> <p>20 my staff to do have found most of this</p> <p>21 activity in the very recent, the last</p> <p>22 couple of years.</p>	<p style="text-align: right;">409</p> <p>1 just described occurred prior to the last</p> <p>2 year or two?</p> <p>3 MR. SOBOL: Objection. Asked</p> <p>4 and answered.</p> <p>5 A. I have not done a formal inquiry</p> <p>6 identifying the number of insured lives</p> <p>7 that have or the percentage of the total</p> <p>8 insured lives that have been subject to</p> <p>9 that type of institutional change.</p> <p>10 Q. And is it your testimony that the impact</p> <p>11 of the allegedly fraudulent scheme ended</p> <p>12 once the Lupron sentencing memo came out?</p> <p>13 A. No.</p> <p>14 Q. What about after the Complaint in this</p> <p>15 case was filed? Once the Complaint in</p> <p>16 this case was filed, were the plaintiffs</p> <p>17 who filed that Complaint still victims of</p> <p>18 the allegedly fraudulent scheme?</p> <p>19 MR. SOBOL: Objection to the</p> <p>20 form.</p> <p>21 You may answer.</p> <p>22 A. The fraudulent scheme is alleged -- the --</p>

24 (Pages 410 to 413)

<p style="text-align: right;">410</p> <p>1 my focus on the fraudulent scheme begins</p> <p>2 with the alleged class period starting</p> <p>3 January 1, 1991, and a measure of the</p> <p>4 impact of and injury is going to be</p> <p>5 looking at actual versus yardstick</p> <p>6 spreads, nonfraudulent spreads.</p> <p>7 The conclusion that injury no</p> <p>8 longer is occurring will be -- will --</p> <p>9 will result -- will be demonstrated to me</p> <p>10 by an analysis of spreads and when they no</p> <p>11 longer are at levels that are -- that</p> <p>12 reach the threshold levels as developed in</p> <p>13 my declaration.</p> <p>14 Q. Were spreads that were negotiated by the</p> <p>15 plaintiffs in this case after the</p> <p>16 Complaint was filed nonfraudulent spreads?</p> <p>17 MR. SOBOL: Objection.</p> <p>18 Can you read that question back,</p> <p>19 please?</p> <p>20 (The pending question was then</p> <p>21 read.)</p> <p>22 A. When was the Complaint filed?</p>	<p style="text-align: right;">412</p> <p>1 Q. Do you plan to use post Complaint spreads</p> <p>2 as a benchmark in this case?</p> <p>3 A. I would not think so.</p> <p>4 Q. Why not?</p> <p>5 A. Because the filing of the Complaint -- I</p> <p>6 have seen -- if I see evidence the filing</p> <p>7 of the Complaint led to a dissipation or</p> <p>8 elimination of the AWP inflation scheme</p> <p>9 that may qualify my answer, but I have</p> <p>10 seen no evidence to that to date nor have</p> <p>11 I been directed by counsel to make any</p> <p>12 such assumption.</p> <p>13 Q. Well, if the spreads during the class</p> <p>14 period were the same as the spreads during</p> <p>15 a nonfraudulent benchmark period, what</p> <p>16 conclusion would you draw from that?</p> <p>17 A. If the spreads were the same during --</p> <p>18 from 1991, say, through 2000, relative to</p> <p>19 1984 through 1990, if they were the same,</p> <p>20 I would draw a conclusion that the scheme,</p> <p>21 while impacting the AWP's, had little or no</p> <p>22 -- caused little or no economic injury.</p>
<p style="text-align: right;">411</p> <p>1 Q. The first Complaint was filed I think in</p> <p>2 around October 2001.</p> <p>3 (Pause.)</p> <p>4 (The witness viewing Hartman</p> <p>5 Exhibit No. 002.)</p> <p>6 A. Looking for data of one of the fast track</p> <p>7 defendants' drugs in table 3A, Vepesid,</p> <p>8 conditioned on the types of issues that we</p> <p>9 talked about yesterday about identifying</p> <p>10 the portion that was sold to hospitals,</p> <p>11 et cetera, it is still the case that the</p> <p>12 spreads were well above the yardstick</p> <p>13 spreads through the end of 2002, and so I</p> <p>14 would look to the spreads. They're</p> <p>15 relative to quarter 2 of 2000, quarter 1</p> <p>16 -- quarter 3 of 2001, they have declined</p> <p>17 some. On average, they have declined some</p> <p>18 from '98 and '99. But they have by no</p> <p>19 means achieved a level that would say that</p> <p>20 the -- that these overcharges on this</p> <p>21 inflation has been squeezed out of the</p> <p>22 system.</p>	<p style="text-align: right;">413</p> <p>1 Q. Are you saying that you are only going to</p> <p>2 use the period prior to the class period</p> <p>3 for benchmarking purposes?</p> <p>4 MR. SOBOL: Objection.</p> <p>5 Q. You are not going to use the period after</p> <p>6 the class period?</p> <p>7 MR. SOBOL: Objection. Asked</p> <p>8 and answered.</p> <p>9 A. I have been directed by counsel in</p> <p>10 paragraph 6 to assume -- the three class</p> <p>11 periods are so identified.</p> <p>12 I am sorry. Did I say three</p> <p>13 class periods?</p> <p>14 The three classes are so</p> <p>15 identified. And the class period is</p> <p>16 identified as January 1991 to the present.</p> <p>17 And that's what I'm -- that's what I'm</p> <p>18 taking.</p> <p>19 Q. So it is your testimony as an economist</p> <p>20 that the fraud continued even after the</p> <p>21 Complaint was filed?</p> <p>22 MR. SOBOL: Objection.</p>

<p style="text-align: right;">414</p> <p>1 A. I have not been asked to study the 2 liability issues of the fraud. I have 3 been told -- I have been asked to assume 4 that this fraud existed over this period 5 of time. That's what -- those are the -- 6 that's my point of departure as given to 7 me by counsel.</p> <p>8 Q. You have been asked to --</p> <p>9 A. I have examined economic data to 10 corroborate, to assess the veracity of 11 those allegations, and I have looked at 12 data from 1991 through as recent as -- as 13 recent a period of time as defendants have 14 been willing to provide to me, and I have 15 seen nothing in the evidence to date that 16 suggests that the filing of this 17 Complaint, that the behavior screeched to 18 a stop, and that all of the alleged 19 activities terminated on that day, and 20 suddenly the AWP dropped to its but-for 21 level. And it -- given the institution, 22 given the fact that contracts have two- or</p>	<p style="text-align: right;">416</p> <p>1 testimony, it's your testimony that a 2 payer can be defrauded and can suffer 3 impact even though the payer knows the 4 true facts?</p> <p>5 MR. SOBOL: Objection.</p> <p>6 Q. Is that your testimony?</p> <p>7 MR. SOBOL: Objection.</p> <p>8 A. My testimony is that the true facts are 9 out there. They will be unearthed by 10 analysis. There will be -- additional 11 information will be provided for these 12 facts by the Medicare Modernization Act 13 and the moves towards transparency. This 14 will happen with some lag. And the 15 understanding of the class members and how 16 quickly they can respond and how they can 17 use -- and how well they can use this 18 information is only going to occur slowly 19 and over time, and this is still subject 20 to litigation. I doubt that defendants or 21 other people will necessarily start to 22 change their behavior until they find out</p>
<p style="text-align: right;">415</p> <p>1 three-year lifetimes in this industry with 2 PBMs and manufacturers, whatever -- what 3 is going to happen here in response to 4 either the filing of this Complaint or 5 injunctive relief will happen with some 6 lag, and so there is nothing that I 7 have -- you know, I would be shocked to be 8 able to see in the data that the date this 9 Complaint was filed that everybody 10 suddenly sat up and flew straight.</p> <p>11 Q. Well, focusing for a moment on contracts 12 that were negotiated after the Complaint 13 was filed, is it your testimony that you 14 have been asked by counsel to assume that 15 the plaintiffs in this case continued to 16 be defrauded after they filed the 17 Complaint?</p> <p>18 MR. SOBOL: Objection to form.</p> <p>19 You may answer.</p> <p>20 A. Isn't that what my -- isn't that what 21 paragraph 6 says?</p> <p>22 Q. So just to make sure I understand your</p>	<p style="text-align: right;">417</p> <p>1 what some of the -- what the resolution to 2 this is, and that -- so there is -- this 3 is an ongoing process right now, and if -- 4 if all of the information I am going to 5 see from you gentlemen's clients were 6 available to the public or to the 7 third-party payers, then -- then there 8 might be a screeching halt to the way that 9 negotiations go on.</p> <p>10 Q. Can you direct me to any authoritative 11 literature which supports the proposition 12 that someone can suffer injury from an 13 alleged fraud even though they know the 14 true facts?</p> <p>15 MR. SOBOL: Objection to the 16 form.</p> <p>17 A. You don't think that is a legal question? 18 That is something left to my lawyers to 19 tell me what to assume or not.</p> <p>20 MR. EDWARDS: I want to mark as 21 Exhibit 17 a copy of Volume 2 of the 22 deposition of Raecann Maxwell taken in this</p>

26 (Pages 418 to 421)

<p style="text-align: right;">418</p> <p>1 case on September 10, 2004. 2 (Deposition of Raeann Maxwell 3 marked Exhibit Hartman 017 4 for identification.) 5 THE WITNESS: Can I return 16 to 6 you? 7 MR. EDWARDS: Sure. 8 (Handing Hartman Exhibit No. 016 9 to Mr. Edwards.) 10 BY MR. EDWARDS: 11 Q. Do you have Exhibit 17? 12 A. I do. 13 Q. Have you read this deposition? 14 A. I do not think so. 15 Q. I want to direct your attention to the 16 testimony that begins on line 20 of 17 page 128. 18 "Question: And from your 19 perspective" -- 20 A. I am sorry. I am sorry. I just wanted to 21 put this in context. So Raeann is -- we 22 are starting in '94 I see for UPMC Health</p>	<p style="text-align: right;">420</p> <p>1 have said line 20. Yes, there it is. 2 (Pause.) 3 (The witness viewing Hartman 4 Exhibit No. 017.) 5 Q. What would your expectation yardstick be 6 for Ms. Maxwell? 7 MR. SOBOL: Objection to form. 8 A. Well, my expectation for Mrs. -- 9 Ms. Maxwell -- I mean I would need to put 10 this a little more in context. But as I 11 read it, on page 128, what I understand 12 the line of questions to be is "Do you 13 have an understanding that Medicare on a 14 going forward basis will reimburse drugs 15 under Part B on an ASP basis -- ASP plus 16 basis rather than AWP minus basis?" And 17 the ASP basis for Medicare Part B drugs is 18 precisely the yardstick that I have 19 included in my set of yardsticks. 20 Now I took it as the regulation 21 said ASP as the actual acquisition cost, 22 and the -- and what the regulations are</p>
<p style="text-align: right;">419</p> <p>1 Plan. Does she work for UPMC Health Plan? 2 I am asking you. Do you know that? Or 3 can you enlighten me as to her -- in 4 response to the question, I would like to 5 know who she is, if I -- if I could. 6 Q. She works for UPMC Health Plan. 7 A. Okay. Thank you. 8 Q. So the testimony beginning at line 20 on 9 page 128 is as follows: 10 "Question: And from your 11 perspective, would it make any difference 12 as to the amount of reimbursement whether 13 or not UPMC calculated that reimbursement 14 on an ASP plus basis rather than an AWP 15 minus basis? 16 "Answer: Not to my knowledge." 17 A. I am sorry. Could you say where that was 18 again? I heard the page and the line, and 19 I think I -- I conflated the two. What 20 page was it? 21 Q. Pages 128 and 129. 22 A. Oh, I was looking at page 120. You must</p>	<p style="text-align: right;">421</p> <p>1 now changing in the Medicare Modernization 2 Act and what they are talking about is 3 rather that they are taking as the 4 estimated acquisition cost, they are not 5 saying ASP, but ASP plus 6 percent or 6 something else. But it is essentially 7 this is someone who is -- understands that 8 -- that there is an ASP basis, and the -- 9 you know, I don't -- to -- as I read that, 10 she understands that there are two 11 formulas, and that it has been used in the 12 past, either the estimated acquisition 13 cost or AWP or 95 percent of AWP, and I'm 14 assuming that she understands that. She 15 seems to understand something about 16 Medicare. And so I'm assuming that not -- 17 that the world hasn't changed in her view 18 except for this slight variation on ASP, 19 and she is assuming that she is getting 20 the correct price, but if -- that's -- 21 unless I know more of the context of this, 22 I -- that's how I am interpreting what I</p>

<p style="text-align: right;">422</p> <p>1 see.</p> <p>2 Q. So you agree with Ms. Maxwell's testimony?</p> <p>3 MR. SOBOL: Objection.</p> <p>4 A. I -- what I agree with is what I just</p> <p>5 said. I agree with the little bit I have</p> <p>6 read here in the context I have read it.</p> <p>7 In order for me to place within context</p> <p>8 the "not to my knowledge" and everything</p> <p>9 that has been said, I would need to read</p> <p>10 the deposition -- the entire transcript or</p> <p>11 more of the transcript than I have. But</p> <p>12 as I understand it here, she says that,</p> <p>13 "Do you have an understanding that</p> <p>14 Medicare on a going forward basis will</p> <p>15 reimburse drugs on Part B on an ASP plus</p> <p>16 basis rather than an AWP minus basis?"</p> <p>17 And she knows the understandings of ASP.</p> <p>18 Q. And then read the question that begins at</p> <p>19 line 14. Go ahead. Read it into the</p> <p>20 record.</p> <p>21 A. "Has UPMC given any consideration of</p> <p>22 whether to shift to an acquisition cost</p>	<p style="text-align: right;">424</p> <p>1 Q. Do you have any basis to disagree with</p> <p>2 Ms. Maxwell's testimony?</p> <p>3 MR. SOBOL: Objection.</p> <p>4 A. At -- well, the -- you haven't given me</p> <p>5 anything to agree or disagree to. You</p> <p>6 have asked me to read eight to ten</p> <p>7 sentences out of a context of which I'm</p> <p>8 not fully aware, and certain statements</p> <p>9 are made.</p> <p>10 Now I can interpret this as</p> <p>11 saying there is a system that relies on</p> <p>12 AWP or estimated acquisition cost, and --</p> <p>13 and she is -- and there is reimbursement</p> <p>14 patterns that are based on those two</p> <p>15 numbers, and it doesn't matter to her,</p> <p>16 because it is being enforced correctly,</p> <p>17 and they are -- they are charging it --</p> <p>18 and the reimbursement is set according to</p> <p>19 regulation.</p> <p>20 Now that is one thing, that she</p> <p>21 knows what is going on.</p> <p>22 Or, alternatively, she has no</p>
<p style="text-align: right;">423</p> <p>1 plus methodology for reimbursing</p> <p>2 prescription drugs dispensed by pharmacies</p> <p>3 or administered by physicians?"</p> <p>4 Q. "Answer: Not currently?"</p> <p>5 A. "Not currently. We have not thought of</p> <p>6 that."</p> <p>7 Q. Question?</p> <p>8 A. "Then from your perspective, would it make</p> <p>9 any difference as to the amount of</p> <p>10 reimbursement whether or not UPMC</p> <p>11 calculated that reimbursement on an ASP</p> <p>12 basis rather than an AWP minus basis?"</p> <p>13 And it -- "Not to my knowledge"</p> <p>14 is her answer.</p> <p>15 Q. So you agree with that testimony?</p> <p>16 MR. SOBOL: Objection to the</p> <p>17 form.</p> <p>18 A. I -- I -- what I see here is what she has</p> <p>19 testified to. What I can either agree or</p> <p>20 disagree to is what that tells me about</p> <p>21 what she knows without reading all of the</p> <p>22 testimony more fully.</p>	<p style="text-align: right;">425</p> <p>1 idea that AWP minus is -- diverges</p> <p>2 considerably, substantially, from ASP.</p> <p>3 I can't tell from those eight</p> <p>4 sentences the level of how much the</p> <p>5 inflation scheme has -- has affected her</p> <p>6 reimbursement practices.</p> <p>7 Q. Let me show you a copy of the deposition</p> <p>8 of David Joyner taken in this case on</p> <p>9 September 23.</p> <p>10 MR. EDWARDS: We will mark this</p> <p>11 as Exhibit 18.</p> <p>12 (Deposition of David Joyner</p> <p>13 marked Exhibit Hartman 018</p> <p>14 for identification.)</p> <p>15 (The witness handing Hartman</p> <p>16 Exhibit No. 017 to Mr. Edwards.)</p> <p>17 BY MR. EDWARDS:</p> <p>18 Q. Have you read this deposition?</p> <p>19 (Handing Hartman Exhibit No. 018</p> <p>20 to the witness.)</p> <p>21 (Pause.)</p> <p>22 (The witness viewing Hartman</p>

28 (Pages 426 to 429)

<p style="text-align: right;">426</p> <p>1 Exhibit No. 018.)</p> <p>2 A. I think this deposition was sent to me,</p> <p>3 but I don't think I had a chance to do</p> <p>4 anything more but skim it very quickly.</p> <p>5 Q. All right. I will represent to you that</p> <p>6 Mr. Joyner is the head of sales for</p> <p>7 Caremark, and I want you to take a look at</p> <p>8 the testimony that begins on page 154 at</p> <p>9 line 14:</p> <p>10 "Question: Well, does it follow</p> <p>11 from that that if" --</p> <p>12 A. I am sorry. If you just let me get there.</p> <p>13 154?</p> <p>14 Q. Line 14.</p> <p>15 (Witness complying.)</p> <p>16 A. Okay.</p> <p>17 Q. "Question: Well, does it follow from that</p> <p>18 that if the manufacturers do not change</p> <p>19 their prices at the top of the chain it is</p> <p>20 not going to make any difference in the</p> <p>21 price your client pays if a benchmark</p> <p>22 other than AWP is used for pricing?"</p>	<p style="text-align: right;">428</p> <p>1 Q. I think it was the other way around, but</p> <p>2 yes.</p> <p>3 A. And is it not a fact that they are a</p> <p>4 defendant in this matter?</p> <p>5 Q. They are not defendants in this matter.</p> <p>6 A. Or associations in fact in this matter?</p> <p>7 Q. They are not.</p> <p>8 MR. SOBOL: They are not what?</p> <p>9 MR. EDWARDS: They are not</p> <p>10 associations in fact.</p> <p>11 A. As alleged in the Complaint, PBMs?</p> <p>12 Q. Well, as alleged in the Complaint. Well,</p> <p>13 you have read the Complaint. You can</p> <p>14 figure that out for yourself.</p> <p>15 A. I can't recall, but it is my recollection</p> <p>16 that they were.</p> <p>17 Q. So what you are going to tell me then is</p> <p>18 you see what Mr. Joyner says but you are</p> <p>19 not going to accept that because you think</p> <p>20 the testimony is tainted in some way?</p> <p>21 A. I haven't said that yet. I just was</p> <p>22 trying to --</p>
<p style="text-align: right;">427</p> <p>1 "Answer: That's correct. The</p> <p>2 marketplace needs a benchmark to set its</p> <p>3 pricing off of.</p> <p>4 "Question: In other words, if</p> <p>5 you use some other benchmark like WAC plus</p> <p>6 or ASP plus, the ultimate price would end</p> <p>7 up to be the same?</p> <p>8 "Answer: It's exactly right.</p> <p>9 But I know of no other pricing source that</p> <p>10 is as comprehensive and as accepted across</p> <p>11 the country as AWP."</p> <p>12 Do you agree with that</p> <p>13 testimony?</p> <p>14 MR. SOBOL: Objection. You said</p> <p>15 "country." I think you meant "industry."</p> <p>16 But even with that qualification.</p> <p>17 MR. EDWARDS: Sorry.</p> <p>18 A. Is it the case -- if I might before</p> <p>19 responding to that understand a little bit</p> <p>20 more -- is it not a fact that Caremark was</p> <p>21 acquired by AdvancePCS sometime in this</p> <p>22 year?</p>	<p style="text-align: right;">429</p> <p>1 Q. Okay.</p> <p>2 A. -- ascertain the facts and put this in a</p> <p>3 context.</p> <p>4 MR. SOBOL: Steve, since the</p> <p>5 question from the testimony that you began</p> <p>6 starts with, "Well, does it follow from</p> <p>7 that," would it be all right to put into</p> <p>8 the record whatever it is that the "that"</p> <p>9 is that the question was relating to?</p> <p>10 MR. EDWARDS: Well, the witness</p> <p>11 can certainly read it.</p> <p>12 MR. SOBOL: If you don't want it</p> <p>13 in the record, then fine. I object to the</p> <p>14 form.</p> <p>15 A. Well, I am sorry. Now -- yes. So let's</p> <p>16 -- as we started talking about the --</p> <p>17 Q. My question --</p> <p>18 A. -- Caremark -- you have read a section to</p> <p>19 me here. Now what? So and the question</p> <p>20 was?</p> <p>21 Q. Do you agree with that testimony?</p> <p>22 A. Okay. And that testimony again started --</p>

<p style="text-align: right;">430</p> <p>1 where am I here? It was on page?</p> <p>2 Q. Page 154 line 14 through page 155 line 4.</p> <p>3 A. I see. We're on this side. No wonder I</p> <p>4 was getting lost.</p> <p>5 (Pause.)</p> <p>6 (The witness viewing Hartman</p> <p>7 Exhibit No. 018.)</p> <p>8 A. The -- what the deponent here is</p> <p>9 expressing is that there is a benchmark</p> <p>10 that is the AWP, and that the marketplace</p> <p>11 needs a benchmark to set its pricing off</p> <p>12 of, and then he says, if you use some</p> <p>13 other benchmark, such as WAC plus, would</p> <p>14 the results be the same.</p> <p>15 Now obviously your interest is</p> <p>16 in or average sale price plus, would the</p> <p>17 results be the same, and it -- he says,</p> <p>18 "It's exactly right. But I know of no</p> <p>19 other pricing source that is as</p> <p>20 comprehensive and as accepted across the</p> <p>21 country as the AWP."</p> <p>22 Now I certainly agree that the</p>	<p style="text-align: right;">432</p> <p>1 MR. SOBOL: Objection.</p> <p>2 A. It seems -- what I have done in my</p> <p>3 declaration, and it seems very explicit,</p> <p>4 is that there is a -- there are spreads,</p> <p>5 and there are spreads that were expected</p> <p>6 as a matter of business practices in this</p> <p>7 market, and that there is sufficiently</p> <p>8 nontransparent contract transactions among</p> <p>9 all the middlepersons that that spread</p> <p>10 changed, which I observe, and which has</p> <p>11 been alleged, and I have been asked to</p> <p>12 assume. And so I am always going to look</p> <p>13 at a spread versus what a spread would be</p> <p>14 absent the AWP inflation scheme that I</p> <p>15 have been directed to assume as alleged.</p> <p>16 Q. The mere fact that a spread between AWP</p> <p>17 and ASP may be 25 percent or 50 percent or</p> <p>18 75 percent or 100 percent doesn't really</p> <p>19 tell you anything? It is not until you</p> <p>20 have developed your expectation yardstick</p> <p>21 that you can draw any conclusions with</p> <p>22 respect to impact? Correct?</p>
<p style="text-align: right;">431</p> <p>1 AWP is a benchmark from whence all</p> <p>2 information and notions of pricings flow</p> <p>3 -- pricing flows, specifically WAC, and if</p> <p>4 the relationship between AWP, WAC, and the</p> <p>5 average sale price conforms with the</p> <p>6 information as the market understood it to</p> <p>7 be, that relationship to be, then there</p> <p>8 would be -- then AWP would be a signal for</p> <p>9 WAC and for ASP. The entire allegations</p> <p>10 in this matter are that the scheme</p> <p>11 interrupted that relationship, and the --</p> <p>12 one could talk about a relationship of</p> <p>13 ASP, but it is much different than it</p> <p>14 would have been in the but-for world.</p> <p>15 Q. So you can't determine from the size of</p> <p>16 the spread between ASP and AWP alone</p> <p>17 whether there has been any impact?</p> <p>18 MR. SOBOL: Objection.</p> <p>19 Q. In order to determine impact, you also</p> <p>20 have to establish your expectation</p> <p>21 yardstick and do a comparison? Is that</p> <p>22 correct?</p>	<p style="text-align: right;">433</p> <p>1 MR. SOBOL: Objection.</p> <p>2 A. As I have stated very explicitly, there</p> <p>3 needs to be yardstick spreads developed to</p> <p>4 determine the size of the injury and the</p> <p>5 damages.</p> <p>6 Q. And if your theory with respect to</p> <p>7 expectation yardsticks is faulty, then</p> <p>8 your entire opinion with respect to impact</p> <p>9 collapses? Is that correct?</p> <p>10 MR. SOBOL: Objection.</p> <p>11 A. No.</p> <p>12 Q. What is the basis for that answer?</p> <p>13 A. Impact flows -- if the allegations are</p> <p>14 true and AWP has indeed been subject to</p> <p>15 the manipulations and the</p> <p>16 misrepresentations as alleged, that has</p> <p>17 affected the AWP of every NDC of every</p> <p>18 drug sold, and that is impact on every</p> <p>19 unit sold to whoever -- whoever ultimately</p> <p>20 reimburses for that. I can't see any more</p> <p>21 clear implications for impact, common</p> <p>22 impact, when reimbursements are related to</p>